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THE ROLE OF SECURITY EXCEPTIONS IN INTERNATIONAL INVESTMENT LAW

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Degree of Doctor of Philosophy in Law**

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Declaration

I hereby declare that this thesis is my own work, except where acknowledgement is given to outside sources. It is submitted to the University of Warwick in support of my application for the degree of Doctor of Philosophy in Law. It has been composed by myself and has not been submitted for a degree at another university.

Abstract

This thesis examines national security/essential security exceptions in the context of international investment law (IIL). Security exceptions in IIL had not received attention prior to Argentina's invocation of essential security exceptions to legitimise its emergency measures against its economic crisis. Consequently, the Argentine cases shed light on the scope of security measures in the IIL arena in that it raised a question as to whether a measure to tackle an economic crisis could fall within the ambit of essential security interests.

Although security has been generally understood as closely associated with national defence, i.e. military security, factors, such as the emergence of new security threats, including energy dependence, economic crisis, and environmental catastrophes, have also affected the scope of security measures against foreign investors. While the tribunals of the Argentine cases regarded economic security as imperative as military security, they did not clearly delineate the scope of legitimate security measures. Therefore, in this thesis, I seek to investigate this limitation and to provide a solution to it by applying insights from critical security studies, which highlight the evolution and broadening of security, into IIL. By applying critical security studies into the IIL arena, this thesis critiques tribunals' interpretation of security exceptions and also explores the implications of the broadening of security that would affect the regulatory space of host states and thereby the interests of foreign investors. The types of foreign investors subject to the potential implications, as a result of the broadening of security, encompass corporate foreign investors, government-controlled foreign investors, and individual foreign investors. Thus, this thesis examines whether each type of foreign investors has distinct security considerations and thus is subject to a different degree of scrutiny in terms of security interests.

The thesis argues that a newly delineated scope of security can also contribute to adjusting the dynamics between host states and foreign investors. As the IIL system has developed heavily focusing on the attraction of foreign capital, this has led the system to fail to highlight the importance of the regulatory space of host states. While the concept of national security takes fundamental part in national policies and the role of exceptions in IIL is pivotal to secure policy-space of host states, the efficacy of

current security exceptions in IIL can be controversial given the strict conditions for their invocation. Therefore, the application of a broadened notion of security can help host states to secure their policy space in order to tackle a serious and urgent threat to national security. Yet, the broadening of security does not signify an unlimited expansion of the concept for the legitimacy of security measures.

Keywords: international investment law, security exceptions, regulatory space

Abbreviations

AB	Appellate Body
BIT	Bilateral Investment Treaty
CBRN	Chemical, Biological, Radiological or Nuclear
CDU	Christian Democratic Union of Germany
CFIUS	Committee on Foreign Investment in the US
CFSP	Common Foreign and Security Policy
CIP	Citizenship by Investment Programme
CNI	Critical National Infrastructure
COPRI	Copenhagen Peace Research Institute
CSDP	Common Security and Defence Policy
CSS	Critical Security Studies
CSU	Christian Social Union of Bavaria
CT	Cultural Theory
DBERR	Department of Business, Enterprise and Regulatory Reform
DSB	Dispute Settlement Body
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EFTA	European Free Trade Association
ESS	European Security Strategy
EU	European Union

FET	Fair and Equitable Treatment
FinCEN	Financial Crimes Enforcement Network
FINSA	Foreign Investment and National Security Act
FIPA	Foreign Investment Promotion and Protection Agreement
FIRA	Foreign Investment Review Act
GATT	General Agreement on Tariffs and Trade
GCIIs	Government-controlled Foreign Investors
GE	General Electric
ICA	Investment Canada Act
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IAs	International Investment Agreements
IIL	International Investment Law
IIP	Individual Investor Programme
IISD	International Institute for Sustainable Development
ILC	International Law Commission
IR	International Relations
LF	Law for Foreigners
MFN	Most Favoured Nation
MMC	Monopolies & Mergers Commission
MTS	Manitoba Telecom Services
NDF	National Development Fund

NSS	National Security Strategy
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
SIDF	Sugar Industry Diversification Foundation
SOEs	State-owned Enterprises
SSA	Special Security Arrangement
SWFs	Sovereign Wealth Funds
TEU	Treaty on European Union
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
US PPI	United States Producer Price Index
USCIS	United States Citizenship and Immigration Services
WMD	Weapons of Mass Destruction
WTO	World Trade Organisation

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INTRODUCTION

1. Background

Given the lack of domestic capital, states have sought ways to attract foreign investment. To become more competitive investment destinations, states have entered into international investment agreements (IIAs) and agreed to provide certain incentives, including full security and protection to foreign investors. On the one hand, IIAs provide substantive and procedural protections to foreign investors, but, on the other, they have limited the regulatory space of host states. This is because foreign investors often view introduction of new regulations at variance with extant IIAs' provisions by host states as a violation of the latter's commitments in IIAs. Therefore, despite the necessity to implement a measure for the protection of public interests, host states are often dissuaded from doing so, due to the possibility of paying compensation to foreign investors for the loss caused by the measure. This concern has occasioned a debate whether the international investment law (IIL) regime has created an asymmetric dynamics between host states and foreign investors.

Amidst the discussion regarding the dynamics between foreign investors and host states, the Argentine government's invocation of the essential security interests and the public order exceptions in its bilateral investment treaty (BIT) with the United States drew attention to the scope of legitimate security measures in IIL. First of all, the Argentine cases are important given that the examination of the exceptions in IIL, especially the "essential security interests" exception, can shed light on the dynamics between foreign investors and host states. Such an examination can help secure the regulatory space of host states to some degree. The fact that the regulatory space was not clearly defined could act in the interests of the host states to maintain certain ambiguity in that it does not restrict or confine the regulatory space, but this can give rise to challenges and opposition to the scope of legitimate measures. Therefore, whilst certain ambiguity is inevitable, it is necessary to delineate and confirm the ambit of the regulatory space. Where the regulatory space is not sufficiently secured, the examination of the efficiency of derogations and exceptions is imperative in order to balance the rights and interests of foreign investors and host states. Thus, this thesis

argues that the evolving understanding of security exceptions can contribute to readjusting the asymmetric relationship between foreign investors and host states and securing the regulatory space of host states with regards to interests that affect the survival of states. This understanding, therefore, can allow host states to implement measures against a variety of threats to their countries without resulting in the obligation to pay compensation.

Secondly, as the Argentine cases were the first where the security exception was discussed at an international tribunal level, the examination of the cases can provide the opportunity to clarify the scope and meaning of the exception. In the cases, the tribunals recognised that military security interests are not the sole security matters, but economic and political security should be treated in the same manner as military security (Chapter 2). This could be construed as a breakthrough insofar as tribunals officially recognised the incorporation of other types of security within the context of essential security interests in IIL, by noting a lack of other types of security would have effects as imperil and imminent as military insecurity. This recognition altered the traditional notion of security that was jointly understood with national defence rather than incorporating other aspects consisting of a state's survival, such as socio-economic security. However, a limited understanding of security would fail to comprehend diverse security demands. In this thesis, therefore, I intend to explore security exceptions and derogations in the IIL context and examine whether diverse security interests have been incorporated in policies that have investment dimensions. In order to probe the emergence of diverse security interests, the thesis analyses theories, state policies, tribunals' awards and legislation. While this analysis can demonstrate discrepancies in understanding security, it can also create room for further development of security exceptions and derogations and the implications of the evolution of security in the IIL arena.

2. Research Questions and Contribution

In order to invoke security exceptions, states need to have a clear understanding of the scope of legitimate measures on the grounds of security interests, and the types of security that could be considered within the definition of essential security interests.

In this thesis, I take issue with the concept of security and examine the following research questions.

- (i) What are the implications of the broadened concept of security in the IIL context?
- (ii) Can the recognition of broadened security contribute to readjusting the dynamics between foreign investors and host states?

With the aim of further examining those research questions, this thesis explores how the notion of security has evolved and been broadened by discussing literature/theories, national security and investment policies, and tribunal awards. In particular, to investigate the first question more contextually, the thesis examines how the broadened notion of security affects the different types of foreign investors, i. e. corporate foreign investors, government-controlled foreign investors, and individual foreign investors. Moreover, to justify the necessity of readjusting the dynamics, the thesis evaluates whether the current relationship between foreign investors and host states has been fairly balanced.

While the examination of theories attests that security is an elusive concept, it can also demonstrate which approach is adequate to reflect current security demands. The comparison between the theoretical analysis and states' policies can also indicate whether the evolution of security has taken place in states' security policies or not.

The theoretical analysis also contributes to the examination of the tribunal awards. On the one hand, the analysis can provide the grounds for the interpretation of the Argentine cases' tribunals, which noted that economic security is as important as military security. Thus, the traditional understanding of security would be inconsistent with the tribunals' interpretation. On the other, it can also highlight the room for clearer interpretation and delineation of the scope of security considerations in IIL. Therefore, by applying the theoretical analysis into examining the tribunals' awards, the thesis can help to justify the tribunals' interpretation, and suggest how security exceptions can further develop, which can contribute to achieving coherence among theory, state practice and tribunal awards.

Moreover, the thesis examines how this newly demarcated/evolving notion of security would influence the interests and rights of foreign investors by comparing three different types of foreign investors: corporate foreign investors, government-controlled foreign investors (GCIs), and individual foreign investors. While GCIs and individual foreign investors share the implications resulting from the broadening of security with corporate foreign investors, it is also true that GCIs and individual foreign investors have distinctive security concerns. For example, a host state might be concerned that a GCI could be run for a political reason, which could potentially create security threats or risks. This concern may legitimise the host state's formulation of more stringent rules for GCIs different from those applicable to corporate foreign investors. By highlighting those implications, the thesis can help host states understand their policy space in relation to different types of foreign investors, and prevent the host states from introducing any arbitrary and discretionary security measures against investors. Accordingly, with distinct security features in mind, I make institutional recommendations with respect to dealing with each type of investors.

3. Methodology

The principal methodology of the study is critical legal studies. I problematise the current understanding of security by exploring security studies and analyse legislation and cases relevant to security in IIL in order to examine whether the current system serves the evolving security interests and demands.

To be more specific, the thesis undertakes an examination of the evolving meaning and scope of security, and a comparative analysis of different security schools to investigate contesting views on the scope of security. It also discusses the emergence of risks as an extension of security, ensuing from the development of security studies. By doing so, the thesis can demonstrate:

- (i) how security has changed;
- (ii) what types of historical events affected this notion;
- (iii) why the broadening of security has taken place;
- (iv) why the traditional approach to security has been challenged for its insufficiency;

- (v) how the emergence/introduction of risk will affect the latitude of the host state's regulatory space in relation to security; and
- (vi) what the possible implications or ramifications of incorporating risk within the scope of security are.

Furthermore, in order to investigate if each country has the divergent security interests in states' policies,¹ I adopt a comparative lens. Thus, the thesis compares and contrasts security strategy reports of different countries (the United States (US), the United Kingdom (UK), Germany and France) and the European Union (EU). This comparative analysis corroborates the premise that while every country shares certain security interests to some extent, each country has its own unique security demands. Thus, states' approaches to security and types of security measures cannot be uniform. This is further supported by the analysis on the EU security strategy, which demonstrates the difficulty in harmonising the field of security at the regional level, i.e. public security, among the EU Member States. This is because the Member States are wary of the diminished regulatory space concerning national security as a result of a higher level of harmonisation of public security.

Moreover, in order to examine how the meaning and scope of security have evolved in national understandings, in conjunction with the comparative studies, a chronological analysis is applied to the examination of national security strategy reports, especially the US from 2001 to 2017 and the UK from 2010 to 2015. This chronological examination illustrates the development of the US's approach to security, how its understanding has changed or evolved, depending on the circumstances and administration. However, the limitation of this analysis lies in the focused discussion of developed countries' security strategy reports. This is because developing countries have a less structured security system and policy, as they are still developing their own systems. But developed countries have been more alert and interested in security, especially the US and European countries where security studies have also been developed, i.e. strategic studies and peace research, respectively, due to their historical backgrounds.

¹ Policies examined include security strategy reports, policies on critical infrastructures, and restrictions imposed on governmental-controlled investment.

To determine whether the evolving understanding of security has been incorporated in the context of IIL, the research undertakes a case law analysis and, in particular, looks at the interpretation of Argentine cases on the point. The examination of the Argentine cases is important in that, as mentioned above, they were the first where a host state invoked essential security interests to legitimise its emergency measures; thus no tribunals had interpreted the clause prior to the cases. The analysis of the tribunals' awards can help establish the currently accepted understanding – although subject to criticisms – and shed light onto the aspect of essential security interests in the IIL arena, which needs further clarification and development. In other words, the analysis can contribute to discerning the area that has room for evolution from the area that is well recognised and elucidating the meaning and scope of security in the IIAs context. The understanding of security exceptions in IIAs is further achieved by comparing and contrasting them with other exceptions and derogations that are used in the IIL arena, such as public order and necessity in terms of scope and requirements for invocation, and by exploring any difference between national security and essential security interests.

Furthermore, the thesis also applies a comparative lens regarding the discussions of GCIs and their status, distinct from corporate foreign investors. Applying the comparative lens helps to determine whether the treatment given to GCIs is different from the one applicable to corporate foreign investors. Where it is so, it will be necessary to examine whether such different treatment is legitimate. In relation to GCIs, the thesis also critiques the policies of critical infrastructure because many GCIs have invested in industries that are related to critical infrastructure with security considerations. To identify whether the understanding of critical infrastructure varies by country, I draw examples from different countries, both in Europe and North America. Those countries were selected for the case study because they have a developed legal framework to stipulate policies regarding critical infrastructure with a clear awareness of the importance of such infrastructure.

While a GCI has a unique status as an investor, an individual foreign investor who gains the citizenship of the host state in exchange for investment under a citizenship-by-investment programme (CIP) also has distinct features. In order to examine if security derogations of CIPs significantly differ across the world, I compare CIPs of

Caribbean islands countries and European countries. As investors under this type of programmes have different aspects of security derogations from corporate investors and GCIs, this thesis also adopts a comparative lens to scrutinise different implications of evolving security depending on the type of investors.

4. Overview of Chapters

Chapter 1 examines the evolving notion of security. I critically examine the traditional approach to discuss how the concept of national security has evolved over time and to examine security schools' arguments as to what should be securitised, who should securitise, and for whom they need to securitise issues. These questions immediately delineate the scope of security, and that is where broadening and deepening national security take place. In order to address these issues, I examine several security schools: the Realist School; the Copenhagen School with securitisation; the Paris School; and the Constructivist School. By examining the schools, I seek to provide a fulcrum for explaining how the concept of national security could be broadened and why the understanding of security in the IIL arena should also evolve. This is followed by discussing risk, which has been assessed as a more efficient tool to tackle some types of security matters.

Whereas Chapter 1 explores security theories, Chapter 2, Chapter 3, and Chapter 4 examine the application of security in IIL. Chapter 2 contributes to an analysis on the Argentine cases which overtly demonstrated the conflict between Argentina and corporate foreign investors with regards to the understanding of security interests in IIL and the scope of measures, in order to examine how tribunals interpreted national security – essential security interests in the BIT between Argentina and the US. With the aim of understanding the international interpretation and highlighting the differentiation, Chapter 2 not only looks at the terms related to security: public order, essential security interests and national security, but also elucidates the relationship between security exceptions and a state of necessity under customary international law.

In addition to the analysis of security exceptions applied to corporate foreign investors, Chapter 3 firstly examines national security policy reports of countries: the US and European countries, as well as public security reports of the EU in order to gauge their understanding of security since differences in their approaches to security can signify

a different threshold for each of them to invoke national security. Especially the chronological analysis of the US security strategy reports demonstrates how a particular aspect of security could be more strengthened or weakened depending on the national circumstances. It further assesses security derogations that are particularly applicable to foreign investment which is controlled, owned, or sponsored by a foreign government, due to the potential significant effect of such investment in national security and critical industries. The chapter subsequently discusses how North American countries and European countries have applied the concept of national security to investment policies in conjunction with GCIs and critical infrastructures, and how they define critical industries in their policies pertinent to foreign investment since the subject of critical industries is closely linked to national security. Host states' concern regarding the potential significant impact of GCIs on critical infrastructures is evidenced by the American intervention in the take-over bid of Dubai Ports Worlds for the company having operated US ports in 2006. Additionally, the chapter evaluates how the concept of national security is used in investment policies, such as whether an exception to restrict foreign investment or a ground for reviews, with cases where a government is involved in a takeover transaction on the grounds of national security.

Chapter 4 shifts the focus from collective investors to individual ones. In particular, it examines whether there is any relation between national security and an individual foreign investor who becomes a citizen or holds a certain residence permit under a special immigration programme. This chapter discusses the controversies surrounding such schemes and sheds light on questions about their legitimacy. Following the examination, the chapter looks at citizenship-by-investment schemes by country: Caribbean countries of St. Kitts and Nevis, and Antigua and Barbuda, and European countries including Malta, Cyprus, Bulgaria, Romania and Ireland. It also examines immigrant residence permit programmes for foreign investors. The chapter then analyses the implications of both types of programmes in the context of national security. More specifically, it probes if those programmes can pose a risk to national security and what type of individuals' citizenship can be revoked on the grounds of national security. The chapter also examines (i) whether the broadening of security has taken place in this context, (ii) whether the explicit recognition of broadening can tackle some problem – possibly based on the risk – as the traditional approach does

not incorporate the role of risk (an imminent threat that is taking place at present), and (iii) whether the broadening of security would cause any negative repercussions.

Chapter 5 problematises the current dynamics between foreign investors and host states, while calling attention to security interests in IIL to balance their rights. In order to gauge the dynamics, the chapter discusses the rights of foreign investors and the level of policy space of host states. This discussion highlights the current asymmetrical dynamics between foreign investors and host states *inter alia* where a host state takes a measure which affects foreign investment, since the motivation of this thesis arises from acknowledging that international and domestic commitments of host states have significantly confined their policy-space. The chapter analyses cases, arising out of different interpretations of measures concerned – whether regulatory or expropriatory – where a foreign investor claims his/her investment is indirectly expropriated, while a host state argues that the measures concerned should be justified within the boundary of police powers, thus resulting in no obligation to compensate for the loss caused by the measures. Therefore, this chapter examines flexibility tools that have been used in IIL, especially the police powers doctrine, and demonstrates how the broadening security clause can supplement the other clauses, by estimating the scope of measures which can be implemented on the grounds of national security.

Lastly, Chapter 6 assesses a potential policy direction and policy suggestions that a host state can contemplate securing its policy space in dealing with foreign investors with highlighting the gap in states' understandings of national security and national investment policies which affect foreign investors on the grounds of national security. The chapter provides general recommendations for host states in relation to securitisation and risks to deal with foreign investors. The recommendations also underline the peculiarity of the security interests of each country to demonstrate that it is pregnable to create one uniform security model. This is followed by the suggestions for law and policy reforms with regards to conceptual and analytical dimensions. By analysing potential impacts arising out of the broadening, the chapter provides institutional recommendations subject to each type of investor, i.e. corporate, government-controlled and individual foreign investors, which is followed by the comparison among the different types of investors regarding the gravity of type of

security. The concluding remarks are contained in the last chapter where I outline the overview of chapters and future research.

CHAPTER 1

Which Security Concept Should Investment Law Use?

1. Definition of Security Studies

As Robert Art states, “security is ambiguous and elastic in its meaning”.¹ This statement shows that security can be the subject matter of different approaches and interpretations. David A. Baldwin explicitly notes that security has been a neglected concept, and advocates the necessity of redefining it.² Such a redefinition is important since security can justify a country’s derogation from its international commitments and obligations, including an obligation of peace-keeping against arms racing. Baldwin suggests that any definition of security must include two considerations, namely ‘security for *whom?*’ and ‘security for *which values?*’³ Baldwin’s suggestion is crucial in both policy and academic terms. This is because these considerations help security schools establish their own identity and create a distinction from other security schools.

Before the Second World War, security was solely used as a concept to tackle external military threats in national defence policy. This belief was so widespread and predominant that it was taken for granted without any challenge. This is understandable because types of threats were not identified and states experiencing wars, imperialism, and colonisation placed their top priority on military security. Traditionally, security studies were likely to take a state-centric approach. Despite this, scholars constantly questioned the legitimacy of the dominant realist perspective towards security, as will be further discussed in the following section. An array of schools have attempted to influence and change the state-centric approach, thereby broadening the scope and deepening the referent object of security ranging from an individual to the international level.

¹ R. Art, ‘Security’, in J. Krieger (ed.), *The Oxford Companion to Politics of the World*, New Oxford: Oxford University Press 1993, p. 820, cited in H. G. Brauch, *Environment and Human Security: Towards Freedom from Hazard Impacts*, UNU-EHS, 2005, p. 8.

² D. A. Baldwin, ‘The Concept of Security’, *Review of International Studies*, vol. 23, no. 1, 1997, p. 8.

³ Ibid p. 13.

In order to define security, Arnold Wolfers distinguishes between security in an objective sense and security in a subjective sense. In an objective sense, security concerns the absence of threats to acquired values, while in a subjective sense, it concerns the absence of fear that such values will be in danger.⁴ In other words, the existence of threats can be objectively evaluated whereas the level of fear where security is threatened to the unbearable level can be different depending on many variables facing countries. The variables are situations or factors which influence the psychology of a state including economic and military power, relationships with other states, and hegemonic status. For instance, one state can think that another country's policy has a negligible influence on its interest or security without taking any particular actions against it. Another state can react very dramatically where the behaviour is viewed as directly threatening its national security. Thus, Wolfers's definition implies the possibility of a state to politicise security issues by interpreting fear in a discretionary way. However, Wolfers's statement regarding the objectiveness of threats is still questionable. This is because threats are determined and classified by each state based on its own political, social and economic circumstances, which are distinct from other states'. This gives rise to different understandings of security among states. For example, in terms of military aspects, the gap between states' understandings can be narrower than an economic crisis and environmental degradation, as thresholds of economic emergency and environmental threats have not been agreed upon to invoke a national security claim. Conversely, the threshold of military insecurity is relatively clearer, as the presence of military threat can be determined based on a state's declaration or physical attack. Yet, there is still room for discretion and subjective interpretations in which states can interpret behaviour of another state or a transnational actor as a threat.

⁴ A. Wolfers, 'National Security as an Ambiguous Symbol', *Political Science Quarterly*, vol. 67, no. 4, 1952, pp. 481-502.

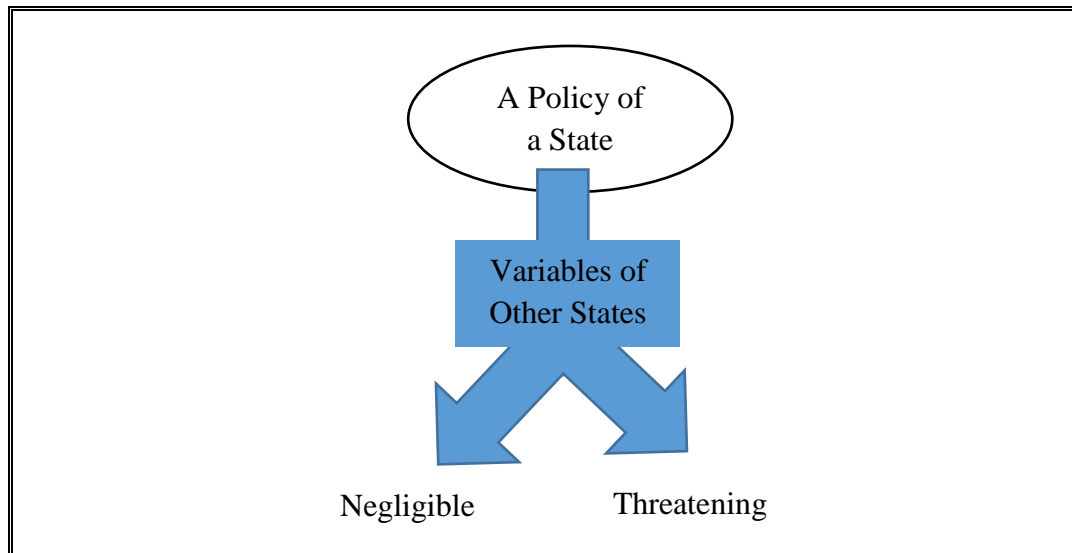


Figure 1 Wolfers's explanation of a state's reaction to another state's policy

Walter Lippmann states, “a nation is secure to the extent to which it is not in danger of having to sacrifice core values if it wishes to avoid war, and is able, if challenged, to maintain them by victory in such a war”.⁵ His explanation is noteworthy although his definition is limited to a nation’s ability to defend its territory in a military sense. Since there is no agreement on what the core values are, it is not implausible that the meaning and scope of core values can be delineated by a state’s arbitrary decision. While Lippmann stays with the position that security should be within the military context, Richard Ullman argues that the concept of security should be expanded to cover natural disasters, such as epidemics, floods, and earthquakes, as a threat.⁶ Ullman’s argument is a milestone given that it leaves more room for security studies in the context of natural disasters, as well as sparks strong resistance to the part of those who oppose the expansion of the scope of security.

Since the Second World War, security has been the subject matter of different perspectives. Some perspectives have attempted to prove that the Realist School’s definition cannot reflect the needs of states. David Baldwin once described the period preceding the Second World War as ‘the most creative and exciting period in the entire

⁵ W. Lippmann, *U.S. Foreign Policy*, Boston: Little, Brown and Company, 1943, p. 51.

⁶ R. H. Ullman, ‘Redefining Security’, *International Security*, vol. 8, no. 1, 1983, pp. 129-153. He questions the traditional understanding of security insofar as such understanding “presupposes that threats arising from outside a state are somehow more dangerous to its security than threats that arise from within” (p. 133).

history of security studies'⁷ since many research centres and courses dealing with security issues at universities in the US were established. Also, the publication of many articles regarding security studies bolstered its emergence as a distinct academic discipline. Post-World War, the dearth of a dominant security school, culminated in diverse non-military issues being also taken into account. Additionally, scholars made an effort to integrate military security and other national objectives such as economic development and welfare in the ambit of security studies at this time.⁸

Security studies during the 1950s and the 1960s essentially focused on issues pertinent to the use of military force in the international system as a consequence of the onset of the nuclear age. The emergence of nuclear weapons overemphasised the military contexts of security, thereby making other security issues insignificant. The main concern during this period was “how to use weapons of mass destruction as instruments of policy”.⁹ Yet, interest in security studies was in parallel with easing the tension between the US and the Soviet Union. Additionally, the Vietnam War, which led to anti-war sentiment in the US, dampened security studies.¹⁰

In the 1970s and the 1980s, the focus of security studies shifted again to other issues, especially economic, mainly because of the truce between the US and the Soviet Union as well as the oil shock in 1973. The oil shock which showed America’s economic vulnerability illustrated that national security could also be threatened by economic sanctions. Yet again the renewed heightened tensions between the US and the Soviet Union in the 1980s changed the main focus of security studies into the use of armed force.

During the Cold War, security studies in Europe focused on alternative defence and peace research. Despite Ole Wæver’s belief that peace and security are closely

⁷ D. A. Baldwin, ‘Security Studies and the End of the Cold War’, *World Politics*, vol. 48, no. 1, 1995, p. 121.

⁸ B. Taylor, ‘The Evolution of National Security Studies’, *National Security College Occasional Paper*, no. 3, 2012, p. 3.

⁹ S. M. Walt, ‘The Renaissance of Security Studies’, *International Studies Quarterly*, vol. 35, no. 2, 1991, p. 214.

¹⁰ Ibid p. 215-216; and, Baldwin, 1995, *supra* note 7, p. 124.

related,¹¹ during the Cold War, they were regarded as dramatically different.¹² Since the 1980s, strategic studies which focused on power in the US and peace research which was widely done in Europe have been merged while sharing some ground, which eventually led to security studies. When peace researchers broadened the concept of violence to define peace, they reached a conclusion that anything that prevents people from realising their potential is violence.¹³ The application of the concept of violence to security by the peace researchers resulted in ‘the most extreme widenings in the history of security thinking’.¹⁴ The concepts of peace and security are related. Particularly, cases of military interventions, such as the United Nations (UN) peacekeepers, are – at least ostensibly – more frequently justified under the pretext of peace rather than for security. Despite their contribution and influence, the peace researchers are enjoined to participate in practices so as to complement lack of empirical grounds.¹⁵

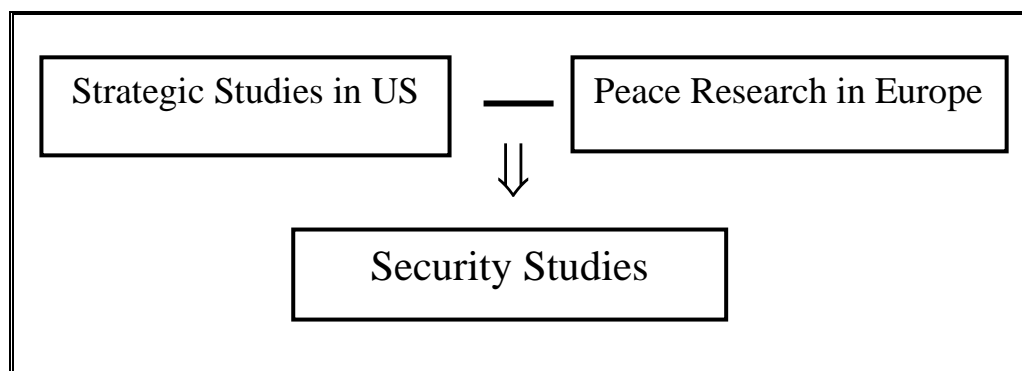


Figure 2 Development of security studies

In the wake of the Cold War, security became aligned with the concept of development. Many scholars argued that the field of security studies should be no longer limited either to reduce the risk of nuclear war or to deter any superpowers.¹⁶ Rather, emphasis should be placed on a broadened agenda which widens the scope of

¹¹ O. Wæver, ‘Peace and Security: Two Concepts and their Relationship’, in S. Guzzini and D. Jung (eds.), *Contemporary Security Analysis and Copenhagen Peace Research*, London: Routledge, 2004, pp. 53-65.

¹² C. A. S. E. Collective, ‘Critical Approaches to Security in Europe: A Networked Manifesto’, *Security Dialogue*, vol. 37, no. 4, 2006, pp. 461-2.

¹³ J. Galtung, ‘Violence, Peace, and Peace Research.’ *Journal of Peace Research*, vol. 6, no. 3, 1969, pp. 168, 170.

¹⁴ Wæver, 2004, *supra* note 11, p. 62.

¹⁵ C. A. S. E. Collective, 2006, *supra* note 12, p. 462.

¹⁶ S. M. Lynn-Jones and S. E. Miller, *Global Dangers: Changing Dimensions of International Security*, Cambridge: MIT Press, 1995, p. 4.

security to include not only military security, but also a variety of security issues such as environmental, economic, societal, and political security. This is believed to diversify the referent objects ranging from human security to international security beyond national security.¹⁷ The nexus between security and development was taken mainly by the UN and the World Bank for implementing many initiatives. The development angle transformed the focus from national security towards global human security. The idea of human security was adopted in the UN Development Programmes and used to conceptualise ‘greed and grievance’¹⁸ and ‘failed states’ dealing with societal conflict and unrest. Security was no longer understood only within the context of military and politics. For example, human rights can be violated without regard to any wars or political struggles. Biological wants and needs cause people to be at risk with chronic threats. This distress has justified intervention in underdeveloped countries by international organisations and developed countries,¹⁹ which eventually led to a controversy that damaging sovereignty can be legitimate by intervention.²⁰

WW II	Cold War Period (1947-1991)			
~1945	1945~1950s	1950s, 1960s	1970s, 1980s	Post-Cold War Era
External Military Threats =>External face	“Golden Age” of Security Studies Economic security and welfare beyond military security	“Nuclear Age” ↓ Great emphasis on military security	Oil Shock ↓ Economic Security	Security+Development ⇒Human Security (economic, political, societal) Broadening and diversifying security

¹⁷ Ibid.

¹⁸ See further M. R. Berdal and D. Malone, *Greedy & Grievance: Economic Agendas in Civil Wars*, Lynne Rienner Publishers, 2000.

¹⁹ This is often undertaken as ‘armed’ humanitarian intervention by military force, for example, Haiti (1994) and East Timor (1999). See further, N. Thomas, and W.T. Tow, ‘The Utility of Human Security: Sovereignty and Humanitarian Intervention’, *Security Dialogue*, vol. 33, no. 2, 2002.

²⁰ J. M. Welsh (ed.), *Humanitarian Intervention and International Relations*, Oxford University Press on Demand, 2004, pp. 34, 52.

		Cold War Tension↑ US's defeat in the Vietnam War ↓ Security Studies↓	Cold War Tension↓ ↓ Military Security↑	UN Development Programme ↓ Human security in the Third World
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Table 1 Security studies' focus by period

2. The Evolution of Security

To understand the evolution of the definition of security, it is necessary to evaluate each school of security studies starting from the traditional perspective of realism and neorealism.

2.1. The Realist School

The Realist School which focuses on traditional security studies, also recognised as strategic studies, examines what the real threats are, how best those threats can be dealt with, and how security actors manage and mismanage security policy. In other words, scholars of traditional security studies look at security issues from an objectivist perspective.

Traditional approaches put military security at the core of security issues and focus on international relations rather than domestic affairs. Strategic studies have maintained that national security is only jeopardised by military-based threat, taking the state-centric perspective. Thus, according to the strategic studies approach, a security concern arises only where a core value of a state is threatened by another state's military means. This implies that national security concerns a conflict between states, and there should be a material military threat which amounts to damaging the core

values. Since the orthodox perspective had prevailed before the end of the Cold War, it could be taken for granted that security issues are to be limited to military security matters.

Historically, realism was developed through the ideas of Thomas Hobbes's *Leviathan*²¹ and Machiavelli's *The Prince*. Hobbes saw the human nature as selfish and non-reliable, which leads the state of nature, without any controls, inevitably to be 'A war of all against all'.²² This state of nature makes a social contract between a state and citizens necessary, and this gives the state sovereignty.²³ Whereas Hobbes justified the exclusive sovereignty, Machiavelli established a state's right to implement excessive measures where necessary. Machiavelli's main argument is "the end justifies the means".²⁴ Therefore, no matter the means, as long as it leads to a good end, it is legitimised. This consideration directly influenced the International Relations (IR) studies to deal with the situation of wars or military conflict between states. Thus, to keep other states from attacking one state's territory and damaging the state's core values, it is permissible to take any measures to remove the threat.

Realists view the international system as anarchic. Here, the meaning of anarchy is the stage where there is no international authority which controls each state's behaviour, rather than chaos in society. They also believe that national power defines the international system. National power involves economic wealth, population, and technology which enable the state to have more developed military forces.

The characteristics became analysed and developed further by different variants of realism, such as neorealism (structural realism). Neorealism was first outlined by Kenneth Waltz in his work *Theory of International Politics*.²⁵ According to his argument, a state is an entity which is independent (self-help) and tends to pursue its own interest (survival), since a state cannot trust other states.²⁶ Without any intentions to expand its own territory or to be hegemonic in the international system, a state

²¹ The original version of *Leviathan* was published in 1651.

²² G. S. Kavka, 'Hobbes's War of All against All', *Ethics*, vol. 93, no. 2, 1983, p. 292.

²³ Ibid p. 296.

²⁴ D. N. Jones and D. L. Paulhus, 'Machiavellianism', in M. R. Leary and R. H. Hoyle (eds.), *Handbook of Individual Differences in Social Behaviour*, New York: Guilford Press, 2009, p. 93.

²⁵ K. N. Waltz, *Theory of International Politics*, Waveland Press, 2010 (originally published in 1979).

²⁶ Ibid pp. 91-105.

develops its military force.²⁷ Thus, a state tries to enhance its relative power by developing military or economic power. To sustain its sovereignty within its territory, a state can establish its own military for the sake of its security. Another state which does not regard the action in question as purely driven by a defensive objective can also develop its military forces further. This is where security dilemma²⁸ appears. The uncertainty in other states' behaviour eventually leads states to enter into arms races since states' intentions are distortedly interpreted.

Waltz claims that internal balancing and external balancing should be used to tackle this security dilemma and eventually to realise security.²⁹ Internal balancing is carried out by the state through the development of its own capabilities in economy and military while external balancing refers to the state's entering into alliances or accessing to international organisations to check the power of other states.³⁰ The balancing approach to security with cooperation is developed as "defensive realism" by Sean Lynn-Jones.³¹ Contrary to this defensive realism which emphasises balancing and cooperation as a solution, offensive realism by John Mearsheimer³² places emphasis on maximising a state's power. Although power remains a means to an end rather than an end in itself, offensive realism argues that maximising power is the best way to ensure a state's survival. States need to assume the worst about other states' intentions; thus alliances are not feasible. Mearsheimer, however, claims that the powerful states also have constraints. Although they want to pursue more power, before taking an offensive action, they consider other states' potential reaction to their behaviour, thus contemplating the benefits and the risks of their actions.³³ In short, neorealists argue that states do not trust one another and that they exist in international anarchy which gives rise to fear. Given that states are sensitive to their relative position,

²⁷ K. Waltz, 'The Origins of War in Neorealist Theory', in R. I. Rotberg and T. K. Robb (eds.), *The Origin and Prevention of Major Wars*, Cambridge: Cambridge University Press, 1989, p. 43.

²⁸ J. Herz, 'Idealist Internationalism and the Security Dilemma', *World Politics*, vol. 2, no. 2, 1950, pp. 157-180.

²⁹ K. N. Waltz, 'Structural Realism after the Cold War', *International Security*, vol. 25, no. 1, 2000, pp. 5-41.

³⁰ Ibid.

³¹ S. M. Lynn-Jones, 'Realism and America's Rise: A Review Essay', *International Security*, vol. 23, no. 2, 1998, pp. 157-182.

³² J. J. Mearsheimer, 'Structural Realism', *International Relations Theories: Discipline and Diversity*, 2007, pp. 75-77.

³³ J. J. Mearsheimer, *The Tragedy of Great Power Politics*, New York: W. W. Norton & Company, 2001, p. 37.

cooperation between states is necessarily short-lived, which eventually leads to the predatory and self-help nature of the diplomacy system.³⁴

This argument does not reflect the reality of international relations which is premised on international and regional state cooperation in that cooperation exists at the regional and international levels, for instance, the EU and the UN. More specifically, there had been many wars, and territorial conflicts between European countries before the European Community was established in spite of many failures. By building up economic and political interdependence, states wish to escape from the chaotic international system and to embrace co-operation. Economic dependence is regarded as the most efficient tool that hinders states from triggering a war since their economy would be at stake.

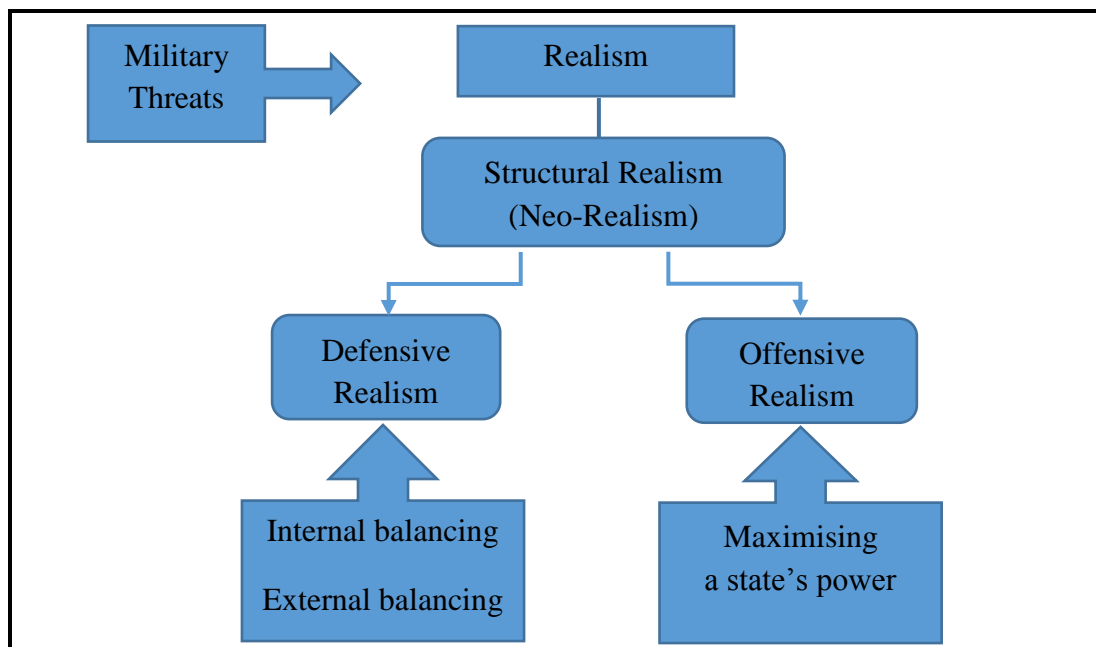


Figure 3 Types of the Realist School

Another weakness of neorealism is that it does not fully explain the cause of war and conflicts in history. Most wars and tensions between states in the past emanated from the quest for territorial expansion, which is not necessarily the case these days. In fact, it could be argued that military threats are not the cause of tensions, but their result. Economic, societal, and political factors tend to bring about military threats. For example, there has been an array of wars caused by religion, ideology and the

³⁴ Ibid pp. 51-53.

ownership of natural resources under the pretext of nominal reasons such as humanitarian or democracy. Focusing only on the military reason for national security without considering other motives of war will amount to trying to find a solution without contemplating the reason and the process.

The main objective of the traditional approach to security is to preserve the *status quo*, rather than to enhance the level of security. Accordingly, neorealism focuses on identifying possible ways of coping with the world and international security environment, while refraining from incorporating radical changes or broadening and deepening horizons of security. For example, Paul Dobb once said “when every international worry becomes a security threat, the meaning of national security is trivialized.”³⁵ Also, Stephen Walt criticises an attempt to consider non-military issues as a security agenda, claiming that “defining the field in this way would destroy its intellectual coherence and make it more difficult to devise solutions to any of these important problems.”³⁶ The main criticism of broadening security as espoused by the Realist School is this incoherence issue. If many sectors are covered in the scope of security, there can occur incompatibility and conflicts in standards between different issues. Yet, in order to solve the incoherence issue, it is suggested that security be invoked only with more strict and specific criteria so that they do not bring about any inconsistency.³⁷ Traditionalists tend to think that other security threats do not involve the same urgency and potential ramification that a military threat portends. Nonetheless, a narrow approach to security issues may well miss global vicissitudes and render security studies outdated. Rather, security studies should evolve in parallel with the emergence of future urgent and dramatic security issues. A state should not only focus on defeating its adversary in military terms, but must also devise ways to disable the adversary’s economy and infrastructure, as evidenced during the Second World War, through economic sanctions. Even if the focus is placed on military threats, the state-centric view cannot deal with contemporary military issues, which are no longer limited between states but extending to those between a transnational network

³⁵ P. Dobb, ‘Climate Change is no Strategic Threat’, *The Spectator Australia*, June 9, 2010, <https://www.spectator.co.uk/2010/06/climate-change-is-no-strategic-threat/> (accessed August 4, 2018).

³⁶ Walt, 1991, *supra* note 9.

³⁷ B. Buzan, O. Wæver and J. de Wilde, *Security: A New Framework for Analysis*. Lynne Rienner Publishers, 1998, p. 5.

and a state,³⁸ including terrorist groups. The very gap between strategic studies and reality necessitates rethinking security studies, as noted below.

2.2. The Copenhagen School and Securitisation

The Copenhagen School originates from the Copenhagen Peace Research Institute (COPRI) which was established in 1985. The COPRI, which was more empirically driven, tries to devise a new concept to comprehend security dynamics in Europe, rather than placing importance on theoretical disputes within IR.³⁹ The Copenhagen School is linked to the idea of Barry Buzan and Ole Wæver's securitisation and desecuritisation.

Wæver distinguished security and insecurity: the former refers to a case where there is an existential threat with sufficient counter-measures to deal with it, whereas the latter means that there is a threat but there are not sufficient measures available to tackle it.⁴⁰ Both security and insecurity are always relative because the determination whether there exists a sufficient measure would be likely influenced by a subjective judgement. Further, Wæver considers that security creates the opposite of normal politics which includes haggling and dialogue.⁴¹

The Copenhagen School seeks to broaden and deepen the concept of security beyond military security and aims to devise a new concept which can explain and understand the reality better. When it comes to defining security, however, the Copenhagen School is influenced by the Realist School's approach. In the book, '*Security: A New Framework for Analysis*,' Buzan et al. argue that "security is about survival. It is when an issue is present as posing an existential threat to a designated referent object."⁴² This traditional approach which stems from the concept of military-political security helps the Copenhagen School to define security. However, for the Copenhagen School,

³⁸ T. Barkwi, and M. Laffey, 'The Postcolonial Moment in Security Studies,' *Review of International Studies*, vol. 32, no. 2, 2006, p. 330.

³⁹ C. A. S. E. Collective, 2006, *supra* note 12, p. 448.

⁴⁰ O. Wæver, 'Securitization and Desecuritization', in R. D. Lipschutz (ed.), *On Security*, New York: Columbia University Press, 1995, p. 56-7.

⁴¹ Ibid.

⁴² Buzan et al., 1998, *supra* note 37, p. 21.

the referent objects are not confined to states, but include government, territory and society.

The Copenhagen School's two main focal points are a sectoral analysis of security by Buzan Barry and securitisation by Ole Wæver. Buzan sectoralises security by adding political, economic, societal and environmental security to traditional military security. His work articulates each security issue in its own contextual term, with practicality and applicability. Buzan's sectoral-based analysis of security questions the boundary of security studies which was considered to be confined to national military security. In addition, Buzan claims that a state should not be the only key actor for security since security issues go beyond national military security. By expanding referent objects to an individual, the Copenhagen School finds it necessary to discuss security issues of identity and culture of a particular group of people such as religious or local communities. It is noteworthy that though Buzan accomplishes the sectoral analysis, he does not seem to examine whether one sector should be prioritised over others, as another security scholar has underlined a series of contradiction between sectors in terms of standards.⁴³ Yet, the contradiction to some extent appears to be inevitable since the threshold for each sector to be securitised will vary.

Wæver and Buzan argue convincingly that security is a socially and politically constructed product of a securitisation process which is enunciated by a policy actor. A security issue is not necessarily required to be a real threat. What is important is that it is framed as an existential threat by the enunciator. Ole Wæver elects a term of a speech act to explain securitisation. A speech act in this context means security issues are the political results from an illocutionary act of security agents.⁴⁴ Then, the central questions of securitisation, Wæver argues, are "who can securitise what, and under what conditions?"

The speech act enables a policy-maker to give a particular issue a special status with the label of security, thereby legitimising extraordinary governmental measures. An enunciator declares an issue has a real existential threat regardless of whether that is true or not. Although the speech may result in a social contest and disagreement against

⁴³ D. Bigo, 'International Political Sociology', in P. D. Williams (ed.), *Security Studies: An Introduction*. New York: Routledge, 2008, p. 123.

⁴⁴ Wæver, 1995, *supra* note 40, p. 57.

it, if it becomes socially and politically accepted, then the issue is classified as an existential threat as the audience accepts it. This speech act, later on, was developed into securitisation and desecuritisation. Wæver coined the term “securitisation” to indicate the process of an issue becoming securitised. An issue can start from non-politicised where people are not aware of the issue nor handle the issue. Then, it gets through politicised, where states can manage the issue by resource and governance, while the public is also aware of the issue, then to securitised where government cannot manage the issue anymore, thereby articulating the politicised issues as an ‘existential threat’ which needs to be security issues. The successful speech act combined with securitisation accords discretion to decide the enemy or to implement exceptional measures to remove the threats by all means beyond the normal realm of politics to the government. The idea of securitisation thus legitimises government’s implementation by all means since a government’s measure is not defined and demarcated. Securitisation always leaves room for abuse. As long as a government or a securitising actor is persuasive enough, the scope of security is unnecessarily broadened without any international consensus either to achieve the hegemonic goal of authority or to realise another purpose other than security. However, broadening the concept of security does not necessarily mean that more issues become threats and thus the higher frequency of invoking security takes place. In order to prevent an increasing number of threats, Wæver highlights the importance of desecuritisation.⁴⁵ Wæver argues that invocation of security should be used at a minimum and a policy actor should aim to relabel a securitised issue as politicised, once the issue becomes manageable within the political sphere. In other words, the ultimate goal of securitisation, Wæver argues, should be desecuritisation.

⁴⁵ Buzan et al, 1998, *supra* note 37, p. 4.

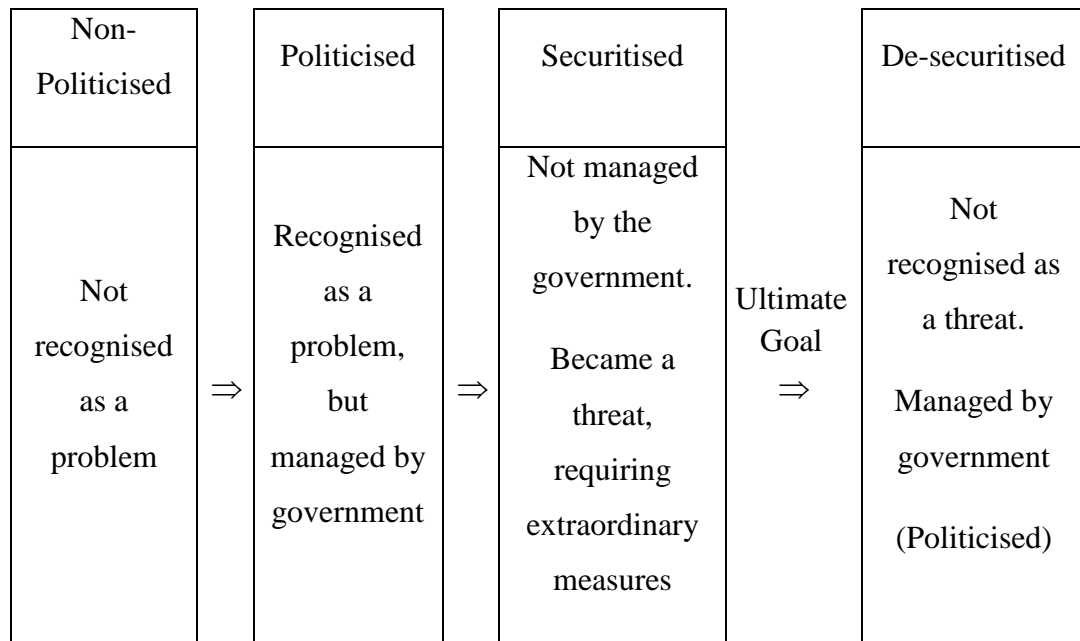


Figure 4 The Copenhagen School's process of securitisation

In addition to securitisation, the Copenhagen School claims, in *Security: A New Framework for Analysis*, that national security should be replaced with international security. This is because the term 'national security' implies that security studies should be state-centric. Considering that security should not be confined to only a nation, but can range from an individual to the globe, it is preferable to use the term 'international security.' Additionally, the Copenhagen School adds that, given the relational nature of security characterised by security dilemma, power balances, and security regime, focusing on one isolated object, that is, the state is of little interest.

The Copenhagen School has expressed scepticism about the inclusion of economic sector into the scope of security. It contends that market economy which is influenced by neo-liberalism allows for ups and downs in the economy and this inherent insecurity encourages competitions, which leads to increased efficiency and productivity.⁴⁶ Moreover, the Copenhagen School argues that economic issues are not strictly separate, but rather pertinent to other sectors such as development issues, famine, and independence in military production. The Copenhagen School claims that a threat to national survival in the economic sector is more likely to arise from other security reasons such as war and cannot be understood as a serious threat unless the survival of

⁴⁶ B. Buzan, *People, States & Fear: An Agenda for International Security Studies in the Post-Cold War Era*, Ecpr Press, 2008, Chapter 6.

the whole population is at stake. Summing up, it argues that securitising economic issues is part of the political-ideological policy debate and can be construed as taking a nationalist and protectionist approach in economic policy. However, other security issues, as well as economic security issues, have multifaceted dimensions. Societal insecurity can arise out of chronic hunger and failed policies, while military insecurity is caused by economic tensions between states. That is why underestimating economic security, on account of its relationship with other sectors, cannot be justified.

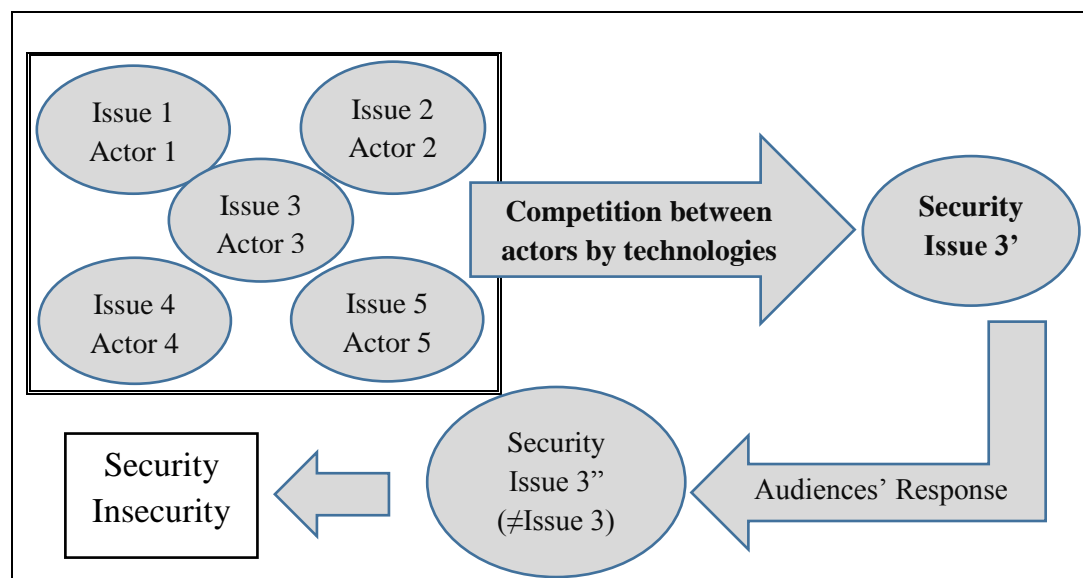
Buzan *et al.* argue that there should be different referent objects depending on places, times and issues. Buzan and Wæver devise a notion of societal security which is distinct from national security. Societal security, for Buzan and Wæver, is not a substitute for state security, but rather complementary to state security. Societal security then captures issues such as migration emphasising ‘concerns about identity’. Although the Copenhagen School widens security to societal security, it still argues that the main actor is a state and state elite who are able to securitise the issue and make policies.

2.3. The Paris School

The Paris School’s approach to security can be explained by two main characteristics: securitisation and governmentality. As suggested above, the Paris School shares an idea with the Copenhagen School regarding securitisation of a speech act to some extent. Didier Bigo, the most prominent scholar in the Paris School, agrees with the interpretation of security made by Ole Wæver in that anything can be enunciated as (in)security given occurrence of new types of fears even if one dominant actor decides the definition and the scope of security. Bigo’s starting point is to highlight the role of security. Security leads to legitimacy followed by politics which is situated at the heart of the meaning of security. Then the definition of security will depend on how the key actors legitimise various security issues. Since it is impossible for everyone’s interest to be taken into account at the same time, there are constant competitions between the capable actors to decide whose security is important and whose security can be sacrificed considering a case where violence conducted by one state can be interpreted as a way to serve the defence while the same violence can be understood as insecurity from the perspective of another state. The notion of sacrifice and its importance on the

process of securitisation led Bigo to conclude that the main questions should be “who is performing an (in)securitisation move or countermove, under what conditions, towards whom, and with what consequences?”⁴⁷ Accordingly, Bigo suggests that it is necessary to clarify a policy actor, circumstances which enable securitisation, referent objects which are to be protected, and objects whose interest is compromised by the process of securitisation, and results caused by the securitisation.

From the perspective of the Paris School, security and insecurity are the ramifications of a process of (in)securitisation. Bigo and Tsoukala argue that an actor who attempts to securitise an issue cannot precisely expect the final result since the result can vary depending on how to define the superiority of security among the actors and on how the audience will accept the definition.⁴⁸ Bigo and Tsoukala also criticise the Copenhagen School’s approach which focuses only on discursive forms of a speech act, which eventually leads to overlooking the processes and practices causing (in)securitisation.⁴⁹ Beyond addressing an issue as a speech act, they argue that it is imperative to analyse the means and technologies used to securitise the issue by professionals.⁵⁰ Their analysis on security professionals is not limited to government constituents, but also covers private agents and their practices.



⁴⁷ D. Bigo and A. Tsoukala, ‘Understanding (in)Security’, in D. Bigo and A. Tsoukala (eds.), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11*, Routledge, 2008, p. 5.

⁴⁸ Ibid pp. 4-5.

⁴⁹ Ibid.

⁵⁰ Ibid p. 8.

Figure 5 The Paris School's process of securitisation

The difference between the Copenhagen School and the Paris School can also be found in the securitisation process. While the Copenhagen School insists that securitisation is realised by a particular speech act, the Paris School contends that routinised practices of professionals of security enable securitisation. Many actors can intervene in defining (in)security with different (in)securitisation moves. They should have enough credentials with the authority to declare an issue as a threat to securitise. Security and insecurity are the consequences of securitisation process led by a successful claim arising out of the competition and the struggles between actors. The successful claim is not always the same as what the actors expected it to be, as shown in Figure 5. This justifies the argument of the Paris School which lays great stress on the process.

While the Copenhagen School is rooted in IR, the Paris School starts with analysing the relationship between a state and its citizens.⁵¹ This approach is mainly influenced by the works of Michel Foucault. The concept of governmentality, suggested by Foucault, indicates how a government controls its citizenship with “the ensemble formed by the institutions, procedures, analysis and reflections, the calculations, and tactics.”⁵² In other words, a state makes use of its bureaucratic means such as institutions so that the state can make a certain idea or a form into a norm.

The Paris School suggests that security can be treated as a technique of government.⁵³ The Paris School also focuses on the outcomes of power games rather than intentions of the actors.⁵⁴ Its main focus is placed on “practices, audiences and contexts” which determine the production of governmentality instead of emphasising speech acts per se. In other words, security is influenced by the discursive ability. Bigo more clearly states the process of securitisation is inevitably connected to ‘a field of security constituted by groups and institutions that authorise themselves and that are authorised

⁵¹ M. Foucault, ‘Governmentality’, in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality*, Hemel Hempstead: Harvester Wheatsheaf, 1991, pp. 87-104.

⁵² Ibid p. 102.

⁵³ C. A. S. E. Collective, 2006, *supra* note 12, p. 457.

⁵⁴ J. Huysmans, ‘Migration and the Politics of Security’, in S. Body-Gendrot and M. Martiniello (eds.), *Minorities in European Cities: The Dynamics of Social Integration and Social Exclusion at the Neighbourhood Level*, London: Palgrave Macmillan, 2000, pp.179-189; J. Huysmans, ‘Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security’, *Alternatives*, vol. 27, no.1, 2002, pp. 41-62.

to state what security is'.⁵⁵ Eventually, the actors define security and, in so doing, they allow themselves to implement extreme measures with legitimacy. This is why for the actors, the successful securitisation stems from their discursive ability in order to gain legitimacy. Meanings which professionals of security produce and the productive power of their practices are the main foci of the Paris School.

The Paris School also underlines the importance of the potential role of desecuritisation⁵⁶ as an attempt to reframe security by understanding the limits of security and resistance. The Paris School argues that the widening approach also needs critical analysis by questioning "Who needs to survive and to be protected and from what" by sacrificing whom.⁵⁷ Bigo also believes the sacrifice always ensues as a result of operating security. Thus, it is implausible to achieve a global security.

Bigo articulates the inseparability of the process of securitisation and of the insecurity.⁵⁸ Institutions securitise societal issues, by insecuritying the audience, thereby calling for certain protection for the audience. In other words, insecuritying the audience is a pivotal part of securitising social issues of which the objective is to legitimise certain excessive actions of institutions/state agencies. Bigo also argues that a concept of insecurity and threat helps agencies "to affirm their role as providers of protection and security."⁵⁹ More securitisation does not mean that the audience feels more secure. For instance, by addressing that one issue becomes a threat to a society, the actors or agents are permitted to intervene in an extreme way. Some coercive or abnormal actions taken by the agencies will increase a feeling of insecurity. The security dilemma, thus, is no longer limited to international relations, but it exists

⁵⁵ D. Bigo, 'When Two Become One: Internal and External Securitisations in Europe', in M. Kelstrup and M. C. Williams (eds.), *International Relations Theory and the Politics of European Integration, Power, Security and Community*, London: Routledge, 2000, p. 195.

⁵⁶ Bigo's desecuritisation has a similarity to that of Wæver insofar as the securitised issue in question should go back to the politicised area from securitised sphere. Yet, Bigo understands desecuritisation as a more interactive process, caused by competitions between actors and audiences' reaction.

⁵⁷ Bigo and Tsoukala, 2008, *supra* note 47, p. 2.

⁵⁸ D. Bigo, 'Criminalisation of Migrants: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion', in B. Bogusz, , R. Cholewinski, A. Cygan, and E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, 2004, p. 65.

⁵⁹ D. Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives*, vol. 27, no. 1, Special Issues, 2002, p. 65.

domestically and internationally. Then the underlying intention for the act does not affect the level of security.

The Paris School goes beyond the Copenhagen School's understanding of securitisation process which gives rise to a dramatic change in the decision-making process and justifies the political exceptions. It analyses the bureaucratic political decisions, taking the Weberian rationalisation approach.⁶⁰ The rationalisation suggested by Max Weber results from scientific and technological advances as the process of modern society, which triggers people to behave by reason and rationality. Rationalisation tends to turn things into numbers and demands the use of technology with the aim of controlling human behaviour.⁶¹ Following a Weberian approach that focuses on the notion of utilising high technologies for communication and surveillance, Bigo and Tsoukala examine how the movement of populations is governed within the EU. They argue that the factors securing the borders of Europe are not limited to the discourses of the politicians, but expand to different transnational networks of professionals of (in)security.⁶² These transnational professionals designate the priorities of security and urgencies of threats, which involve competition about the definition and the scope of security.⁶³ Bigo and Tsoukala mention that private actors, beyond politicians, such as the professionals of management of (in)security, and the private agencies of risk management, are involved in securitisation by their routines.⁶⁴ They add that because some (in)securitisation moves are embedded as a routine, they are understood as the continuum of the routine rather than a particular speech act.⁶⁵

⁶⁰ J. Huysmans, 'The Question of the Limit: Desecuritisation and the Aesthetics of Horror in Political Realism', *Millennium*, vol. 27, no. 3, p. 579.

⁶¹ S. Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History', *American Journal of Sociology*, vol. 85, no. 5, 1980, p. 1169.

⁶² Bigo and Tsoukala, 2008, *supra* note 47, p. 4.

⁶³ *Ibid* p. 8.

⁶⁴ *Ibid* pp. 5, 7-8.

⁶⁵ *Ibid* p. 5.

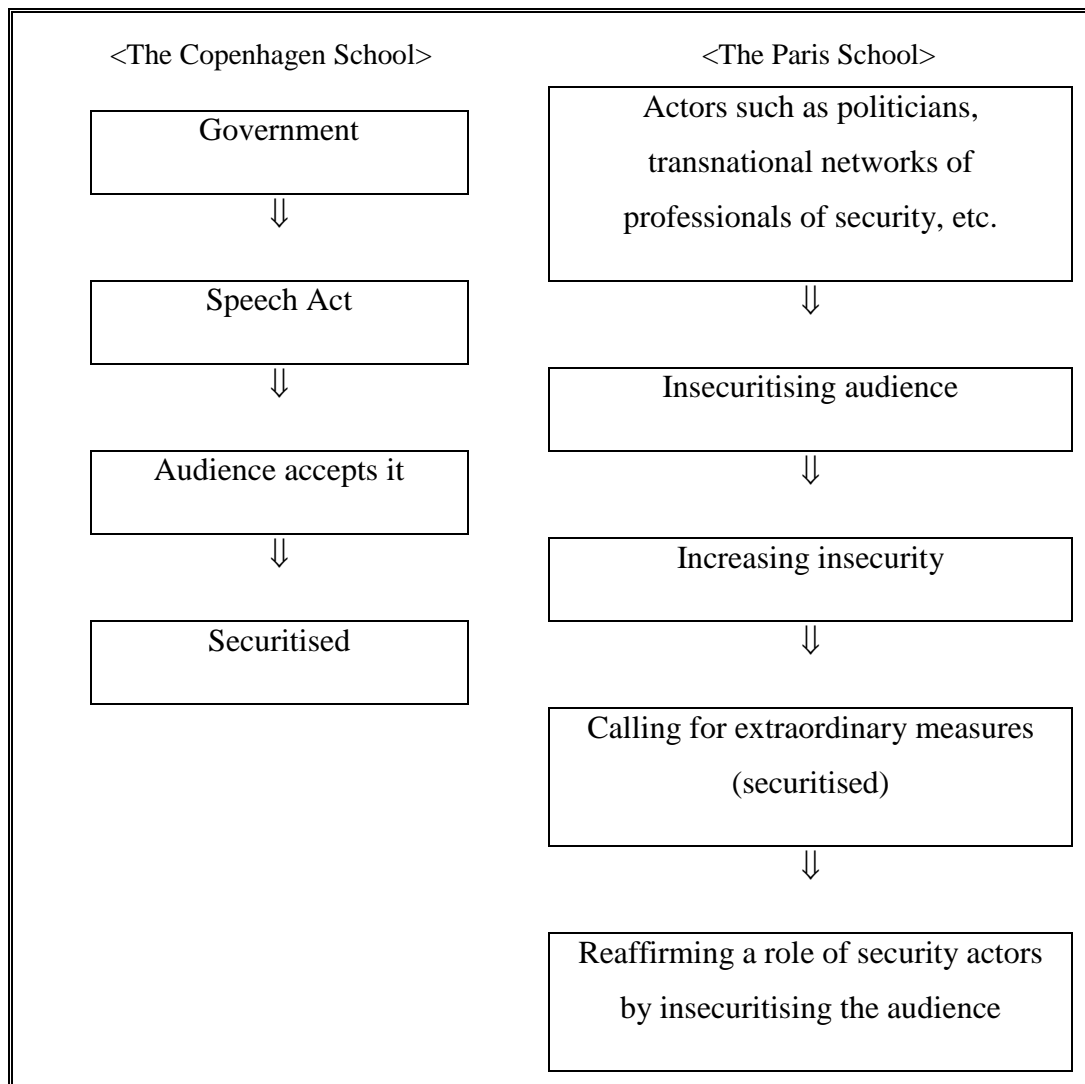


Figure 6 Comparison between the Copenhagen School and the Paris School in securitisation

Finally, the Paris School distinguishes itself from the Copenhagen School on the grounds of orientation.⁶⁶ While the latter advocates international security and makes use of the concept of survival, the former places emphasis on internal security – less international-oriented – and amalgamates the internal security with external one, which is contrary to the approach which sees a clear division between external and internal security.⁶⁷

In that sense, distinct from other schools, the Paris School focuses more on policing practices, the development of internal security, and securitisation of migration in

⁶⁶ The Aberystwyth (Welsh) School and the Copenhagen School find their roots in IR studies while the Paris School derives from political theory, the sociology of migration and policing in Europe.

⁶⁷ Bigo, 2000, *supra* note 55, pp. 171-205.

Europe from the socio-political perspectives based on socio-political theory. The Paris School analyses politicisation of societal insecurities especially border controls and migration issues, incorporating different academic disciplines of criminology and political sociology of security.⁶⁸ As it mainly examines societal and political security issues, it remains uncertain how its approach can be applied in the economic and environmental sectors.

In conclusion, the Paris School takes a closer look at the structuring practices of security professionals, governmental rationality, and the effects of security technology and knowledge used by the security actors.⁶⁹ However, because it emphasises the relationship between citizens and government or professionals of security and internal security rather than international politics relations by focusing on sociological theory, it is questionable if it can be applicable in *realpolitik* to deal with economic recessions or trans-border environmental conflicts involving states diplomacy.

2.4. The Constructivist School

Despite the new approach and the achievement of the Paris School, it neither sufficiently addresses the problem of the established concept of security, nor challenges the concept. On the contrary, the Constructivist School's starting point is to question the constructed concept of security. In this section, two perspectives which take a constructivist perspective towards security will be demonstrated: Critical Security Studies (CSS) and the Welsh School.

Contrary to strategic studies which are military-focused and state-centred, the critical approach takes a dynamic view of the security environment with a critical understanding of the relationship between theory and practice. CSS was influenced by the Frankfurt School's critical studies which argue that all knowledge is produced socially and politically, thereby playing a role of serving interests of a particular group of people; hence, knowledge is a social process. Also, Robert Cox who articulates necessity of applying the critical theory in IR states that knowledge (theory) is "always

⁶⁸ Ibid.

⁶⁹ C. A. S. E. Collective, 2006, *supra* note 12, p. 449.

for someone and for some purpose.”⁷⁰ Based on Cox’s words, regressive theories are for those who are currently in power for the sake of their maintenance in their power and position.

Critical theorists contend that a socially constructed concept such as society and politics should be denaturalised. In other words, the objective of critical theory is to reject belief and knowledge which are widely taken for granted – naturalism – and to grasp the way society is organised root and branch.⁷¹ The critical theorists expect that destructuring and questioning can lead to social progress. Max Horkheimer argues that this social progress eventually brings about emancipation. For Horkheimer, emancipation is the freeing of individual human beings from suffering to pursue their happiness. In reality, however, the circumstances surrounding human beings hinder possibilities for a better life since the way the society is organised is not conducive to realising the possibilities, but rather serves the interest of capital.⁷² Although his analysis mainly focuses on criticising capitalism, his attempt to understand society from different angles by questioning the prevailing order and politics provides the ground for critical security studies.

Unlike traditional approaches laying emphasis on what security really is and what threats are (objective fact), CSS starts from questioning what strategic studies takes for granted, namely, the referent object of security is only state and security studies only concern military threats. Traditionalists determined the referent object as a state and this idea was taken for granted, so CSS’s starting point was to question the traditional perspective to security studies focusing on a state as an actor, and to deconstruct their predominant ideas of security. Security by CSS is understood in different contexts including how it can be variously represented, which involves a political debate dealing with different issues. CSS has begun in earnest with questioning the referent object of security by Keith Krause and Michael C. Williams.⁷³ Rethinking who or what is to be secured and for what reasons leads to an attempt to

⁷⁰ R. W. Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’, *Millennium: Journal of International Studies*, vol. 10, no. 2, 1981, pp. 126-155.

⁷¹ R. Wyn-Jones, *Security, Strategy, and Critical Theory*. London: Lynne Rienner Publishers, 1999, p. 20.

⁷² M. Horkheimer, *Critical Theory: Selected Essays*, translated by M. J. O’Connell and others, New York: Seabury Press, 1972, p. 213.

⁷³ K. Krause and M. C. Williams (eds.), *Critical Security Studies: Concepts and Strategies*, London and New York: Routledge, 2002, pp. 167-169, 334-335.

broaden the security agenda. Where the referent object involves not only a state but also other referent objects such as an individual, the scope of security is also widened because it is necessary to consider how the security of the other referent objects can be achieved, which is not necessarily related to physical security against war.⁷⁴

Distinct from Krause and Williams' study,⁷⁵ Ken Booth and Richard Wyn Jones have been another phase of critical studies, the Welsh (Aberystwyth) School.⁷⁶ Booth underlines the dynamic interaction between ideas and reality in human relations.⁷⁷ He pointed out the two main problems of the traditional approach to security. First, the military-focused security approach does not solve the security dilemma. It rather leads to high spending on the defensive military establishment. Second, other threats and the well-being of people arise as new security issues. For instance, daily threats such as chronic hunger and societal instability that some people suffer in failed states are not dealt with in the context of the traditional security perspectives.⁷⁸ The new challenges, including ethnic rivalry, political oppression and economic recessions, are primarily the results of governmental policies rather than of other states' desire to expand their territory. He adds that if those issues were not treated, more instability within the territory would ensue. In addition to this, issues of refugees and violence occurring at borders have increased tensions between states. Booth compares developing countries with wealthy countries, arguing that there has not been a war between developed countries since the Second World War.⁷⁹ His comparison explicates that the countries which did not achieve democracy and economic freedom are more exposed to the possibility of wars and conflicts.

Booth argues that a critical approach should be an attempt to move beyond prevailing structures and ideologies surrounding the issues in question by understanding many different perspectives including political and historical. Moreover, he asserts that in

⁷⁴ K. Krause and M. C. Williams, 'From Strategy to Security: Foundation of Critical Security Studies', in K. Krause and M. C. Williams (eds.), *Critical Security Studies: Concepts and Strategies*, London and New York: Routledge, 2002, p. 44.

⁷⁵ Ibid.

⁷⁶ See R. W. Jones (ed.), *Critical Theory and World Politics*, Colorado and London: Lynne Rienner Publishers, 2001; and K. Booth, *Theory of World Security* (vol. 105), Cambridge University Press, 2007.

⁷⁷ K. Booth, 'Security and Emancipation', *Review of International Studies*, vol. 17, no. 4, 1991, p. 315.

⁷⁸ Ibid p. 318.

⁷⁹ Ibid p. 319.

order to understand security, one needs to embrace ideas pertaining to different referent objects and threats and to conduct an analysis at different levels. The ultimate referent object, for Booth, should be individuals, while states can be a means to provide security. Booth says “it is illogical to privilege the security of the means as opposed to the security of ends.”⁸⁰ This reiterates Booth’s argument that individual’s security, which is the end, should always take precedence over states’ security. It implies that each individual’s sacrifice to achieve a state’s security such as war to defeat adversaries cannot be justified. It is logical to think that the ultimate referent object of security should be each individual, but the appropriate referent object can differ on a case-by-case basis. From Booth’s perspective, security is emancipation, not given by power and order which are exclusive of individuals. He thinks ‘security means the absence of threats.’ When people are free from not only physical constraints caused by war but also from basic human needs and wants including poverty, and poor education. The critical security approach can better reflect demand in reality and escape from the Western-centric view. Nevertheless, the emancipation idea fails to suggest how the recognition of issues and such demand can become a policy to fulfil the basic human needs. Booth argues that those who have been ignored by the traditional security studies should be considered as security subjects. By doing so, the scope of (in)security includes human rights abuses, minority issues and marginalisation of women and powerless groups of people.⁸¹

Booth and Wyn Jones⁸² have clearer answers when there is a clash between different securities. They, especially Booth, argue that the pivot of security studies is the individual emancipation which is prior to other security issues involving power and order.⁸³ Prioritising power and order may well entail the sacrifice of some people. When security means the absence of threats,⁸⁴ Booth argues that constraints which prevent people from carrying out their desires are threats, and military threats are just one of those constraints.⁸⁵ He concludes that states should not be the main referent objects of security in spite of their importance in the world politics because they are

⁸⁰ Ibid p. 320.

⁸¹ K. Booth, ‘Realities of Security: Editor’s Introduction’, *International Relations*, vol. 18, no. 1, 2004, p. 8.

⁸² Wyn-Jones, 1999, *supra* note 71, p. 126.

⁸³ See further Booth, 1991, *supra* note 77; and Wyn-Jones, 1999, *supra* note 71.

⁸⁴ Buzan et al, 1998, *supra* note 37, pp. 16-18.

⁸⁵ Booth, 1991, *supra* note 77, p. 319.

“unreliable, illogical, and too diverse in their character”.⁸⁶ The history has shown that states sometimes do not behave in a reliable way, which is evidenced by the two World Wars, and failed states which oppress their own citizens. Also, since he puts individuals or groups of security at the heart of the studies, it is illogical that states’ security should have primacy. Lastly, the character of each state cannot be explained and described in homogenous terms. That is, each state faces its own unique circumstances in economic, political and societal contexts. Therefore, simply determining a state as the main referent object can lead to standardising characteristics of states, thereby disregarding different variables between states. Booth situates the reciprocity of rights at the heart of his argument of emancipation. Freedom and well-being of one depend on those of another. He does not demarcate the boundary between external and internal security.⁸⁷ While understanding realism has played a role to deal with inter-state wars, he points out that violence is not only a consequence of wars; it is performed by states towards populations for a number of reasons.⁸⁸

3. Risk

The notion of security has been studied and analysed, as it plays an important role in determining types of security measures (or emergency measures) that can be legitimised in order to tackle threats or abnormal situations. However, it has been increasingly suggested that risk than security can better grasp the post-Cold War era.⁸⁹ Buzan and Hansen argue that risk analysis has been considered as a better way to tackle terrorism and migration issues.⁹⁰ In addition to those issues, the concept of risk assessment has been also widely used in the decision-making for locating an investment. Once risk analysis influenced security studies, embracing risk as part of security studies is deemed as a reflexive way to approach security in that coping with current and existential threats is no longer sufficient to achieve security. Risk analysis is based on the estimation of threats in the future. Hence, the objective of the analysis

⁸⁶ Ibid p. 320.

⁸⁷ Ibid p. 322.

⁸⁸ Ibid p. 323.

⁸⁹ See further M. V. Rasmussen, ‘Reflexive Security: NATO and International Risk Society’, *Millennium*, vol. 30, no. 2, 2002, pp. 285–309; M. V. Rasmussen, ‘It Sounds Like a Riddle: Security Studies, the War on Terror and Risk’, *Millennium*, vol. 33, no. 2, 2004, pp. 381–95, C. Coker, *Globalisation and Insecurity in the Twenty-first Century: NATO and the Management of Risk* (no. 345), Routledge, 2014.

⁹⁰ B. Buzan and L. Hansen, *The Evolution of International Security Studies*, Cambridge University Press, 2009, pp. 205-251.

is to predict future threats and devise rational measures or policies which can diminish or even remove the risk.⁹¹

As defined in dictionaries, risk means the possibility of something bad and unpleasant happening. Jaeger *et al.* define risk as “a situation or event in which something of human value (including human themselves) has been put at stake and where the outcome is uncertain.”⁹² In this definition, uncertainty is closely related to the existence of risk. Henry N. Pollack also clearly expresses the inseparability between uncertainty and risk, claiming that risk arises out of uncertainty and even with the most developed technology and scientific methods, absolute certainty cannot be expected.⁹³

Risk is not a present threat, but a threat which has a possibility to happen in the future. The development of risk analysis began in the 1990s when scholars argued that risk is a socially constructed concept by questioning the objectiveness of risk as a simple mixture of harm and probability.⁹⁴ Ulrich Beck argues that risks are generally invisible, but they can only exist when they are defined by institutions which possess knowledge, such as the mass media, legal systems and science.⁹⁵ The institutions who can define risks are also able to redefine and adjust the level of risks. In order to illustrate the aspect of risk as a socially constructed concept, Beck articulates *relations of definition* which means that actors who have the power to define risk can “maximise risks for others and minimise for themselves”.⁹⁶ He added that this is evidenced by the attempts of Western governments and non-governmental actors such as credit rating agencies to define risks for others.

Beck also contends that experiencing a negative event in the past leads to predicting the wrong type of risk. Thus, focusing on one risk, as a result of the negative event in

⁹¹ See further J. Adams, *Risk*, London: University College London Press, 1995; P. Bernstein, *Against the Gods: The Remarkable Story of Risk*, New York: John Wiley & Sons, 1998; F. Ewald, ‘Insurance and Risk’, in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmental Rationality*, Hemel Hempstead: Harvester Wheatsheaf, 1991; M. Power, *The Risk Management of Everything: Rethinking the Politics of Uncertainty*, London: Demos, 2004.

⁹² C. C. Jaeger, O. Renn, E. A. Rosa, and T. Webler, *Risk, Uncertainty, and Rational Action*, Routledge, 2013, p. 17.

⁹³ H. N. Pollack, *Uncertain Science... Uncertain World*, Cambridge University Press, 2003, p. 6.

⁹⁴ H. G. Brauch, ‘Concept of Security Threats, Challenges, Vulnerabilities and Risks’, in H.G. Brauch et al. (eds.), *Coping with Global Environmental Change, Disasters and Security*, Berlin, Heidelberg: Springer-Verlag, 2011, p. 81.

⁹⁵ U. Beck, *Risk Society – Towards a New Modernity*, London: Sage, 1992, pp. 22-23.

⁹⁶ U. Beck, ‘Living in the World Risk Society’, *Economy and Society*, vol. 3, no. 3, 2006, p. 333.

the past, can lead to overlooking other risks since a catastrophic event does not arise out of our expectation and calculation in relation to the past.⁹⁷ Although risk analysis was at first grounded on the premise that risks are measurable and calculable, according to Beck's theory of risk society, in modern society, risks can go beyond calculable repercussions and compensability. Diversified security threats, such as transnational terrorist groups and economic and environmental threats, not only increase the security threats but also make security risks complex and less predictable.⁹⁸ Therefore, from Beck's perspective, the concept of risk is not static, but socially constructed and open to changes by reflecting the societal events.⁹⁹ By the same token, Niklas Luhmann argues that risk is an indicator to calculate the 'likelihood' of that negative occurrence, but it cannot predict what will exactly happen in the future since there are many causes which hinder things from going as predicted and it is not plausible that rational calculation can take all causes into account.¹⁰⁰

Beck also analyses the relevance of technology and risk. In modernity (risk society), technology gives rise to unpredictable events which cannot be insured against since those events have "unimaginable implications", which makes the future uncertain.¹⁰¹ Adding to Beck's argument, other scholars also claim that the progress of technology was expected to develop the society better, but the unintended results of modernisation have increased risk concerns.¹⁰² For example, with respect to the 9/11 terrorist attack, by pointing out the unpredictability of such an event, Beck underlines that society has become less competent to ensure its own security. Given the inability, Beck suggests that transnational threats can be only tackled by cosmopolitanism, which indicates all states should be involved in the process of dealing with the risk in question.¹⁰³ Despite the ideal aspect of cosmopolitanism, it is difficult for all states to have the same perspective on transnational risk issues. Whereas terrorism is something all countries should regard as a threat, some issues such as migration and environment policies still remain controversial. Moreover, any issues which affect one national interest,

⁹⁷ Ibid p. 330.

⁹⁸ Brauch, 2011, *supra* note 94, p. 63.

⁹⁹ Rasmussen, 2002, *supra* note 89, pp. 285–309; Rasmussen, 2004, *supra* note 89, pp. 381–95.

¹⁰⁰ N. Luhmann, *Risk: A Sociological Theory*, New York: Walter de Gruyter, 1993, p. 12.

¹⁰¹ Brauch, 2011, *supra* note 94, p. 101.

¹⁰² Jaeger et al., 2013, *supra* note 92, p. 15.

¹⁰³ U. Beck and N. Sznaider, 'Unpacking Cosmopolitanism for the Social Sciences: a Research Agenda.' *The British Journal of Sociology*, vol. 57, no. 1, 2006, pp. 1–23.

especially of powerful countries, hardly can be labelled as a universal threat even if the risk is deemed as threatening the rest of world.

In a situation where risk is less calculable and predictable, analysing how people perceive risk and how institutions govern it becomes fundamental. Mary Douglas and Aaron Wildavsky analyse how culture can affect people to perceive risk by applying the cultural theory (CT) in their book, *Risk and Culture*. They contend that risk perception about social and environmental concerns is socially and culturally framed.¹⁰⁴ Individuals are living in a society which frames individuals' values, attitudes and worldviews. Where one event occurs, an individual does not recognise the event based on his/her individual cognitive processes but based on socially shared values.¹⁰⁵ Since values determine the interpretation of information, people with different values tend to interpret differently on the same issue and accept fear selectively.

In CT, Douglas and Wildavsky argue that risk perception is closely related to 'cultural adherence' and 'social learning'.¹⁰⁶ To understand cultural adherence and social learning, they built *grid-group* typology. Grid index (control) refers to what degree individuals' behaviour is restricted and group index (commitment) refers to what degree one individual is bonded to a social group he/she belongs to. Depending on the level of grid and group, worldviews are classified into individualistic, egalitarian, hierarchical, and fatalistic. For instance, individualists (low grid, low group) see the world as self-governing and understand risk as part of life and an opportunity having a potential to enhance their lives. They consider anything that can impede their freedom as a risk. Likewise, egalitarians (high group, low grid) dislike social structures which are defined by a small group of elite and they think the structures should be open to negotiation. They fear inequality within their society and see it as a risk which will damage the future generations. Those with the hierarchical worldview (high group, high grid) determine which risk is acceptable and which is not, depending on

¹⁰⁴ M. Douglas and A. Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers*, California: University of California Press, 1982.

¹⁰⁵ A. Wildavsky, and K. Dake, 'Theories of Risk Perception: Who Fears What and Why?', *Daedalus*, vol. 119, no. 4, 1990, pp. 41–60.

¹⁰⁶ Cultural adherence indicates level of attachment and obedience of members in society to their culture and surroundings. Social learning indicates a process that a member of society learns certain behaviours, values and attitudes through social interaction.

governmental authorities' decisions. If the risk is legitimised by the government, they believe the risk is acceptable. The fatalists (low group, high grid) also share some commonalities with those with the hierarchical worldview insofar as they show full compliance with socially assigned rules, but they tend not to challenge anything if they believe they cannot.

The classification analysis demonstrates that depending on the worldview, people can perceive one event differently. Cass R. Sunstein explores how Americans perceive terrorism and climate change, both of which can cause catastrophic repercussions.¹⁰⁷ They show a high level of fears and concerns against terrorism, while climate change was less likely to be regarded as a severe threat. In view of the grid/group typology, Americans are less egalitarian and more individualistic given that they do not fear climate change which involves the welfare of future generation, while they show a high level of concerns against terrorism which will directly affect their freedom and lives. Accordingly, Sunstein concludes the risk perception mainly stems from 'cultural cognition' or 'cultural orientations'.¹⁰⁸

Beck's explanation on how risk is constructed and the work of Douglas and Wildavsky analysing risk perception effectively challenge risk's objectivity; risk always has room for an arbitrary definition and people react differently to the same issue not because of the risk's characteristic but because of their cultural value or the intent of policy elite.

The real question is how the theory of risk society and the cultural theory should interact in politics. The limitation of risk analysis lies in dealing with consequences of governmental measures towards risk. If the risk is defined by institutions which retain authority, this feature always gives discretion for labelling political adversaries as future threats. Since the potential damage is expected to be significantly high, politicians are more likely to overreact than underestimate risks in order to avoid political responsibility.¹⁰⁹ If a powerful country imposes a sanction against a powerless country probably because a policy or behaviour of the country seems suspicious, a problem arises where the impact of measures taken outweighs the perceived misbehaviour. It is also problematic where the decision to impose sanctions per se is a

¹⁰⁷ C. R. Sunstein, *Worst-Case Scenarios*, Harvard University Press, 2007, p. 53.

¹⁰⁸ Ibid p. 66-67.

¹⁰⁹ Beck, 2006, *supra* note 96, p. 336.

misjudgement in the first place or where the behaviour proved not to be a threat. Therefore, the next step of risk analysis should aim to deal with consequences, more specifically, compensation issues. For example, a host state implements a measure based on its risk analysis and assessment, which adversely affects foreign investment, but if the risk turns out as false or the measure concerned proves inappropriate, the foreign investors will be entitled seek to adequate compensations.

Furthermore, as Beck suggests, it is necessary to bring a question of defining risks to the table, despite the difficulty in reaching an agreement. Since measures on risk are pre-emptive, they should always be under the close scrutiny of all states to ascertain if they are not used as a means to achieve other objectives. Therefore, delineating scope and level of governments' action towards risk should be also discussed at the international level to prevent governments' arbitrary measures although this should not be used as a barrier to achieving security and public welfare of one state.

4. My Approach

The Realist School's approach has clearly demonstrated its limitations to the extent that it cannot reflect the evolving security demands in preparation for emerging security threats and risks. Their sole emphasis on the existential interstate military threats would prevent states from taking measures against other types of national exigencies, such as an economic crisis, and diminish the importance of enhancing preparedness and resilience against risks with potentially catastrophic ramifications. Consequently, the inability of incorporating diverse security interests leads to questioning the legitimacy of security studies. Therefore, in this thesis, I draw on the Copenhagen School since it relies on the broadened notion of security, based on the sectoral analysis and the speech act theory. The sectoral analysis can provide the grounds for widening security – the incorporation of political and socio-economic security – and this resultantly can expand the scope of legitimate security measures. The speech act analysis is also adequate to explain how an issue, which was not recognised as a threat, becomes politicised and securitised. However, the Copenhagen School does not explain which type of security should take precedence where different security interests are in conflict. The school also does not discuss the possibility that securitisation could develop against its initial enunciated plans. Thus, given the Copenhagen School's limitations, I blend its insights with other schools', such as the

Constructivist School and the Paris School. Based on the Constructivist School's approach, where different security interests are in conflict, a state should prioritise individuals' security over others, as they are the essential security referent object. Moreover, regarding securitisation, insights from the Paris School and the Constructivist School can help to scrutinise the process of securitisation by questioning the intention of securitisation and assessing whether the result of securitisation is consistent with the initial plans, which can be used as a basis to determine the legitimacy of measures.

5. Conclusion

A security clause exempts a state from international obligations in case of an urgent situation which threatens the core values of the state so that international obligations are not to be used as a barrier to the pursuit of national welfare. The implied importance of security bolstered scholars to pursue a clearer understanding of security and minimise government abuse of security. These security studies have implications for investment law, as the incorporation of such an understanding can provide better guidelines for host states to introduce measures related to security that affect foreign investors and foreign investment.

As shown above, over the decades, the focus of security studies has varied. If international tension, such as the Second World War and the Cold War, is aggravated, the external military threat may well be regarded as primary threats whereby significance of other threats can be diminished. The sequent events of the two world wars and the Cold War justified the Realist School's argument that military security was the top priority. Following the Cold War, security scholars began to question the legitimacy of the Realist School's perspective and sought to delineate the scope of security and referent objects which should be incorporated into the realm of security by broadening and deepening security studies. This effort led to redefining security. One conclusion which can be inferred from the attempts to redefine security is that, given the political characteristic and inherent ambiguity, security cannot be easily defined. The two specifications – security for whom and security for which values - which were suggested by Baldwin to define security are seminal because they can provide the ground to define security. Obviously, threats and core values are pivotal concepts for determining security. However, these concepts are subject to ambiguity

and subjectivity since threats and fears of a state are determined by its specific variables.

The Realist School denounced broadening the scope of security and expressed its concern over trivialisation of security issues, while underestimating urgency and ramifications of other security issues. Despite the Realist School's argument, other security issues such as economic, societal, political and environmental insecurity can give rise to consequences which are as formidable as military threats. In addition, military threats are not simply caused by political conflicts between states, but by economic and ideological reasons. That is why focusing only on military issues can lead to overlooking the main cause of the threats. Thus, military security cannot simply take precedence over other security concerns.

Security schools including the Copenhagen School, the Paris School, and the Constructivist School challenged the Realist School's narrow approach due to the latter's inability to recognise other security demands.

The Copenhagen School seeks to broaden the scope of security by sectoral analysis and diversify the referent objects from a state to society. Moreover, it demonstrates how an issue becomes politicised and securitised (securitisation) by a speech act. The Copenhagen School's objective was not to unconditionally incorporate all the issues into the category of security. Instead, Wæver argues that invoking security should be minimised and issues should be tackled within the normal politics, if possible, by encouraging desecuritisation.

The Paris School also illustrates how an issue becomes securitised. Distinct from the Copenhagen School, the Paris School's securitisation involves competition between actors and gives rise to security and insecurity since securitisation does not always proceed as planned on account of contingencies in the process. The Paris School does not confine security actors to a government but expands to other professionals. The Copenhagen School and the Paris School have the same view of defining security insofar as any issue can be classified as security as long as the actors are persuasive and audiences accept it. When it comes to securitisation, while the Copenhagen School places emphasis on how an issue is securitised, the Paris School explains tactics of

securitisation which are accompanied by governmentality and usage of (in)securitisation as a tool to reaffirm a role of the actors.

Lastly, the Constructivist School (CSS and the Welsh School) criticises the predominant view – the Realist School – in that the realist approach cannot solve security dilemma, and the narrow view cannot respond to other new threats. The Constructivist School does not confine its view into one specific approach. It rather incorporates many different perspectives to determine what should be considered a threat and what should be secured from the threat within the realm of security. The Constructivist School points out that where countries experience societal instability, they are more exposed to wars and conflicts, which shows that certain level of social stability is a prerequisite to achieve security. It also claims that the ultimate referent object are individuals, not states because states exist for individuals (nationals). Yet, the Constructivist School argues that depending on the type of issues, the referent object can vary. This approach looks at security in a more flexible and reflexive way.

	The Realist School	The Copenhagen School	The Paris School	The Constructivist School (The Welsh School)
Definition of Security	Survival	Survival (Societal survival)	Defined by actors	Emancipation (Absence of threats)
Threat	Military threats damaging core values	Declared by policy actors	Declared by actors	Constraints which prevent people from carrying out their desires
Referent Object	State	State, government, territory, society	State	Individuals (however, it can be decided on a case-by-case basis)
Scope	Military or military-related	Economic, Military, Environmental, Societal, and Political	Mainly, political and societal	Not limited, both international, national, and individual level

Table 2 Comparison of Schools' views towards security

Although the coverage of security studies became diverse, it was convincingly suggested that security is not sufficient to make the best of the current situation since security has a reactive characteristic. Put differently, if there occurs an existential threat which has catastrophic ramifications, the result of the threat is unrecoverable. Accordingly, this calls for risk analysis with a pre-emptive action.

Risk analysis started with the premise that risk is calculable, so it has an objective characteristic. However, this objectivity has been challenged by an array of analyses. Beck's 'relations of the definition' provides understanding that risks can be labelled by those who possess power and knowledge. The cultural theory by Douglas and Wildavsky also illustrates that risk is not objectively recognised, but rather it is perceived based on the cultural value of a society where an individual belongs or the intent of policy elite. Beck's explanation and the risk perception analysis of Douglas and Wildavsky proved that risk has space for an arbitrary definition and manoeuvre.

Security studies should be directed towards not only security issues but also the process of securitisation. Furthermore, if security studies fail to reflect security demands, the studies will become obsolete and government can be potentially hindered from pursuing their security. As will be shown in the following chapters, the understanding of current or evolving security demands is pivotal. This is because cases, following emergency measures taken by the Argentine government, which affected the interests of foreign investors, illustrate that economic security is as imperative as military security. Thus, the limited approach to security would create contradiction between security studies and current security demands, at least in the IIL area. The evolution of security is not limited to currently existing threats, but extends to threats in the future, and, if necessary, it can become wider and narrower. Therefore, security should evolve in parallel with the development of threats, core values and demands in reality. The next chapter will examine how this evolution of security has been incorporated in national security policies.

CHAPTER 2

The Notion of Security in International Investment Law and Policy

1. Introduction

The previous chapter problematised the concept of security and analysed different schools' theoretical approaches to security. The attempt to demonstrate the evolution of security and to analyse the security schools is imperative in this thesis in that it demonstrates how security has been conceptualised. The analysis shows that the concept of security should continue to be probed because it is constantly evolving. In addition to examining each security school, the previous chapter provides a basis to justify the argument of this thesis on which security school's approach adequately reflects real contemporary demands, especially regarding the interpretation of security exceptions in IIL.

My main argument in the previous chapter is that the limited approach to security can no longer reflect the real demands of the international society and states' interests in a globalised world. Hence, a new approach is necessary. Security concerns are not confined to only military conflicts between states, but cover economic and political stability and social matters. What is more, conflicts between states or between social groups do not always stem from one simple reason. Therefore, a comprehensive approach which can reflect contemporary security issues is needed in national arenas and in IIL.

While the concept of security has evolved in the national security area, it was not widely discussed in IIL prior to the Argentine cases. The Argentine cases originated from certain emergency measures the Argentine government took against its economic crisis. These cases shed light on the evolving concept and scope of security, more specifically on essential security interests in IIAs as well as the economic aspect of necessity under customary international law. Tribunals of the Argentine cases were requested to determine if the measures taken against economic exigencies could fall within the scope of essential security interests and if certain emergency measures could

be excused due to the Argentine crisis. Importantly, the Argentine cases interrogate whether a measure aimed at tackling an economic crisis could be legitimised on the grounds of essential security interests in IIL (*ex-post*). At the same time. The cases create further room for discussion regarding the legitimacy of any policies and measures for protecting public needs and essential security interests that affect foreign investment prior to any economic or financial crisis (*ex-ante*).¹

Given the importance of the Argentine cases regarding the interpretation of essential security interests and necessity, this chapter will show the broader approach to security of international judicial bodies on national security exceptions in IIL. Firstly the chapter contributes to the analysis of the Argentine cases. Furthermore, this chapter will look at the terms related to security: public order, essential security interests, and national security by comparing how they have been used in international law and construed by judicial bodies. This chapter will also elucidate the relationship between security exceptions and a state of necessity. The basic argument of this thesis is that a host state should be able to take security measures against economic insecurity, such as an economic crisis, on the grounds of essential security interests in IIAs. The thesis also argues that a clear demarcation of security exceptions can help secure the policy space of a host state in relation to foreign investment and also prevent arbitrary measures implemented by a host state.

2. Interpretation of Security in International Investment Agreements

2.1. Background of the Argentine Cases

CMS, Enron, LG&E, and Continental Casualty Company (“the Claimants”, which are American foreign investors) respectively commenced arbitration proceedings against the Argentine Republic before the International Centre for Settlement of Investment Disputes (ICSID).² The Claimants claimed that their rights under the 1991 Bilateral Treaty between the United States of America and the Argentine Republic concerning

¹ The discourse on the relationship between foreign investment and security in ex-ante terms includes permission issues on establishment or mergers and acquisitions of certain industries, mostly, critical industries by foreign investors, which does not involve emergency situations.

² Continental Casualty Company invested in CNA Aseguradora de Riesgos del Trabajo S.A. (CNA), an insurance company.

the Reciprocal Encouragement and Protection of Investment (the Argentina-US BIT),³ the essential security interests clause is reserved only for military considerations as opposed to economic and political ones.⁴ Therefore this chapter will examine Argentine emergency measures in relation to the cases of *CMS v. Argentine Republic*,⁵ *LG&E v. Argentine Republic*,⁶ *Continental Casualty Company v. Argentine Republic*⁷ and *Enron v. Argentine Republic*.⁸

The cases are closely linked to Argentine Economic Reforms in 1989,⁹ which included economic liberalisation, privatisation of critical industries, and negotiation of bilateral investment treaties in order to foster foreign investment and international trade.¹⁰ To privatise Gas del Estado, a state-owned gas entity, the Argentine government enacted the Gas Law (Law 24.076)¹¹ in 1992 and the Gas Decree (Decree 1738/92)¹² on gas transportation and distribution for the implementation of the Gas Law. Thus, to implement the privatisation, Gas del Estado was divided into two gas transportation and eight distribution companies.¹³ CMS Gas Transmission Company (CMS) invested in Transportadora de Gas del Norte (TGN), one of the gas transportation companies. Enron Corporation (Enron) invested in Transportadora de Gas del Sur (TGS), the other transportation company. LG&E Corporation invested in gas distribution companies, while Continental Casualty Company invested in the financial sector. The Argentine government also enacted the Convertibility Law in order to stabilise the Argentine peso and encourage foreign investment. From 1992 to 2001, Argentina pegged the Argentine peso at par with the US dollar.¹⁴ While Argentina pursued vigorous

³ Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (1991).

⁴ *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, Oct 3, 2006, (hereinafter *LG&E Decision*), paras 217-219.

⁵ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, September 2005 (hereinafter *CMS Award*).

⁶ *LG&E Decision*, *supra* note 5.

⁷ *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, September 5, 2008 (hereinafter *Continental Award*).

⁸ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, May 2007 (hereinafter *Enron Award*).

⁹ Law No. 23.696 of 1989 on the Reform of the State.

¹⁰ J. Bambaci, T. Saront and M. Tommasi, 'The Political Economy of Economic Reforms in Argentina', *The Journal of Policy Reform*, vol. 5, no. 2, 2002, p. 75.

¹¹ Law No. 24.076 of 1992 on the Privatization of the Gas Sector (Gas Law).

¹² Decree No. 1738/92 on the Implementation of the Gas Law (Gas Decree).

¹³ J. Crawford, K. Lee and E. Lauterpacht (eds.), *ICSID Reports* (vol. 14), Cambridge University Press, 2009, p. 165.

¹⁴ Law No. 23.928 of 1991 on Currency Convertibility and Decree No. 2128/91.

privatisation of critical industries further to its economic plan, a severe economic crisis struck Argentina at the end of the 1990s. To tackle the crisis, the Argentine government enacted economic measures including restricting the right to withdraw money from bank accounts (pesos 250 or US \$250 a week).¹⁵ Despite these measures, the crisis worsened whereby the government declared a default on its foreign debt.

Emergency Law No. 25.561 was enacted in January 2002 which declared a public emergency until December 10, 2003. The Emergency Law effected a reform in the foreign exchange system¹⁶ and abolished the Convertibility Law.¹⁷ The calculation of tariffs in US dollars was abandoned, the peso was devalued, and different exchange rates were applied to different transactions. CMS, Continental Enron and LG&E claimed that the Argentine government took the following emergency measures:

- i) Termination of the Convertibility Law (1 Argentine peso=1 US dollar) and devaluation of the peso;
- ii) Restriction on the right to withdraw deposits from bank accounts;
- iii) Prohibition on free transfer of funds out of its territory;
- iv) Pesification of US dollar-denominated deposits;¹⁸ and
- v) Default on governmental debt.

The Argentine government requested a discussion with the Claimants over a suspension of a tariff adjustment in accordance with the United States Producer Price Index (US PPI) because an increased tariff in the energy sector might well deepen the economic recession. After gas transportation companies including CMS and Enron agreed on the suspension, ENARGAS, the national gas regulatory entity, and the Argentine government decided to continue the suspension of the tariff adjustment based on the US PPI. Moreover, tariffs which had been denominated in dollars were redenominated in pesos at par while governmental or private debt was converted at a rate of 1.40 peso to one US dollar.

¹⁵ Decree No. 1570/2001, December 3, 2001. The limitations on cash withdrawal are called “the Corralito”.

¹⁶ Law No. 25.561 of 2002 (Emergency Law).

¹⁷ Ibid and Decree 260/02 of the National Executive Power, February 8, 2002.

¹⁸ Private or governmental debt was calculated at a rate of 1.40 peso for each nominal US dollar and others were converted at par.

Following the implementation of those emergency measures, the foreign investors claimed that the Argentine government's promises and guarantees in the BIT and licences were not fulfilled, especially in light of a real return in dollar terms and the adjustment of tariffs (based on the US PPI),¹⁹ and that the devaluation of the peso made a negative impact on cost structures. In addition, CMS asserted that the value of the shares that it acquired in TGN dramatically decreased and that this occurred because tariff adjustments did not take place and tariffs had been calculated in pesos, not in US dollars, which led to a severe decrease in the tariff revenue. The Claimants, thus, claimed that the measures taken by the Argentine government violated commitments made to foreign investors, such as the calculation of tariffs in US dollars, the adjustment of tariff in accordance with the US PPI, and the general adjustment of tariffs every five years in order to keep the real value of tariffs in dollars.²⁰ Besides, the License agreement stipulated that when any regulations on tariffs occurred, the companies in which foreign investors invested would be entitled to compensation for the loss incurred by such regulations and that the rules for the License shall not be changed without licensees' agreement.²¹

In addition, Continental, which invested in the financial sector, alleged that the Public Emergency Law 25.561 and measures adopted impaired its interests by abolishing the Convertibility Law, which resulted in forced conversion to pesos of all dollar-denominated financial instruments, indebtedness, and contracts. Continental further claimed that Argentina violated Article IV (expropriation) and Article II(2)(b) (fair and equitable treatment) of the BIT by declaring a default on Argentine internal and external debt.²² In response to this claim, Argentina asserted the measures were legitimised "because of the economic, social and institutional crisis precipitated in the Argentine Republic, which was the gravest of the country's history"²³ and the adoption of the measures was "absolutely exceptional"²⁴ "for the recovery of the country's economic, financial and social situation".²⁵

¹⁹ *CMS Award*, *supra* note 6, para 68.

²⁰ *Ibid* para 85.

²¹ Decree No. 2255/92, December 2, 1992 (License), para 18.2.

²² *Continental Award*, *supra* note 8, paras 100, 101.

²³ Argentina's Counter-Memorial on the Merits, May 8, 2006, paras 19-20.

²⁴ *Ibid*.

²⁵ *Ibid* para 369.

Similarly, CMS argued that it was entitled to the application of the agreed tariff and that the government measures violated the investment protections under the Argentina-US BIT. They also claimed that Argentina expropriated CMS's investment without proper compensation, violating Article IV (expropriation) of the BIT and failed to provide fair and equitable treatment on Article II(2)(a) and (b).²⁶ In response, the Argentine government argued that transportation and distribution of gas is a national public service with considerable social needs.²⁷ This would imply that industries with public interests should be treated in a different manner. Transportation and distribution of gas or other types of energy sectors have frequently appeared on many national security strategy reports of many countries as energy security although countries have not clearly specified how they will accommodate the energy security.²⁸ The Argentine government, as demonstrated in Ole Wæver's speech act theory,²⁹ by labelling gas industries as having a national essential security interest, claimed that the measures which influenced the transportation and distribution of gas industries were inevitably implemented for the protection of particular social needs, i.e. essential security interests. Hence, to protect essential security interests, the measures should be justified and the government was obligated to control the undertaking of the contract. Therefore, Argentina denounced the CMS's claim by arguing that:

- (i) the government was entitled to regulate tariffs for social and other public purposes;
- (ii) there were no governmental guarantees to maintain economic or exchange rate policies; and
- (iii) risks resulting from such policies are not attributable to the government.

By referring to a national emergency and particular social needs, the argument of the Argentine government is considerably reliant on the national security exception clause (Essential Security) on the BIT and a state of necessity under customary international law.

²⁶ *CMS Award*, *supra* note 6, para 88.

²⁷ *Ibid* para 93.

²⁸ This is discussed in the following chapter on National Security Approaches of Countries.

²⁹ See Chapter 1.2.2. The Copenhagen School and Securitisation.

Each article in the BIT is not specifically titled, but Essential Security appears in the United States 2012 Model BIT.

Article 18: Essential Security specifies,

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.³⁰

By stating that a Party shall not be precluded from taking measures “if the Party considers measures necessary”, this article grants a state the discretion to determine the necessity of measures adequate to the situation. Moreover, the expressions, such as “international peace or security” and the “protection of its own essential security interests”, are usually aligned with essential security interests. Although there is no further explanation on those terms, the distinction between international peace or security and its own essential security interests is clear insofar as the former indicates a global scale of threats, while the latter targets domestic concerns.

Likewise, the Argentina-US BIT contains a similar clause. With the goal of legitimising the emergency measures taken and being exempt from the obligation to compensation, Argentina invoked Article XI of the Argentina-US BIT which specifies:

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Despite the absence of a title on Essential Security in the BIT, when compared to the provisions of the US Model BIT, it can be understood that the article in question

³⁰ United States 2012 Model BIT,
<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

provides essential security interests. As above, exceptional clauses often take a negative form because they ought to show that the clause in question is only to be invoked in an exceptional and infrequent manner. Simply put, the article provides that either Party, in this case, either the US or Argentina, can take measures which are regarded as necessary for its essential security interests. At first glance, the difference is whether the clause is self-judging or not. Article 18 of the US Model BIT is a self-judging as a government would have the discretion as to if it is necessary to introduce a measure, whereas Article XI of the BIT provides that “the application of ...measures necessary...” shall not be precluded, which means the government may not have the discretion to determine the necessity. And this matter would be determined by a tribunal.

Argentina argued that the national economic and political crisis had to be addressed and therefore the measures were necessary “for the maintenance of public order” and “the protection of its own essential security interests” by invoking Article XI of the BIT. While it is imperative to understand the definition and scope of essential security interests in this context, distinguishing between public order and essential security interests in IIAs is also crucial. Such distinction can help delineate the scope of essential security interests, i.e. whether their scopes overlap or they exist in different spheres. Thus, before examining the tribunals’ awards, it is important to point out the meaning of public order in IIL and the relationship between public order and essential security interests. Additionally, if there is any substantial difference between essential security interests and national security in BITs.

2.2. Public Order

Public order is widely used as a legal term of national law in the constitutions of some continental European countries, such as France, Italy and Switzerland, although the interpretation of the concept is subject to the specific national jurisprudence.³¹ In Germany, public order is understood as an orderly life of the people in a community, which is commonly used with public security whereas, in the US, the term can often be found in criminal law, described as a condition with the absence of widespread

³¹ OECD, ‘Security-Related Terms in International Investment Law and in National Security Strategies’, *OECD*, Mar 2009, p. 3.

criminal and political violence.³² Sometimes, the term is used in conjunction with public health³³ and public morals,³⁴ while in some cases it appears with national security or sound development of national economy.³⁵ Thus, the concept of public order plays various roles in different countries. On the other hand, in international law, there is no certain category to classify public order or tool to interpret the term. This is further discussed in the OECD 2009 report on “Security-related Terms in International Investment Law and in National Security Strategies” (the OECD 2009 report), which finds no evidence that treaties have the same interpretations or definitions of public order. This is because the term has neither been explicitly defined nor had an exhaustive list.³⁶ This indicates that a state can use the term differently in various contexts, thus highlighting the need for further clarification of the term in IIL. Without a common meaning of public order, it could be argued that international private law principles propose that the diverse uses of public order by country be the standard for international use to some extent.³⁷ Accordingly, public order can be more flexible insofar as, barring agreed governing law, a country’s law covering public order can be the standard for invocation, given that as public order has no internationally recognised definition.

The OECD 2009 report, in effect, explores the meaning and the usages of public order. The report explains that the term “public order” originated from “*ordre public*” in French, and points out that if the term is accurately translated into English, it is close to public policy rather than public order.³⁸ However, it has been used in different wordings as public order, public policy or *ordre public* even in English text. In European Community (EC) law, the meaning of public policy³⁹ has not escaped the

³² Ibid.

³³ Article 3(i) of OECD Code of Liberalisation of Capital Movements 2018 (hereinafter OECD Investment Code); Article 36 of the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2016/C 202/01.

³⁴ Article 3(i) of OECD Investment Code; General Agreement on Trade in Services (GATS) (1994), Article XIV (a); Article 30 of the Treaty Establishing the European Community, 2002/C 325 /01 (public morality, public policy or public security).

³⁵ Protocol 3 of Agreement between Japan and the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investment (1988).

³⁶ OECD, 2009, *supra* note 32.

³⁷ Ibid p. 15.

³⁸ Ibid pp. 3, 6-8.

³⁹ This is the preferred translation of public order in EC law and frequently used alongside with public security.

attention of the European Court of Justice (ECJ).⁴⁰ Although the ECJ acknowledged that the content of public policy is subject to each country's definition,⁴¹ the ECJ has sought to minimise the possibility for EU Member States avoiding from their obligations by defining public policy interests as interests only "crucial for the protection of the political, social or economic order in the Member State".⁴² The ECJ held that member states may invoke public order and security if there are overriding public interests.⁴³

In *Regina v. Pierre Bouchereau*, the ECJ noted that the concept of public policy provides for a situation of "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."⁴⁴ The ECJ's approach to public order is also found in IIAs including Article 16 (d) of the BIT between Japan and the Republic of Korea (2002), which states that:

Each Contracting Party may take any measures necessary for the maintenance of public order. The public order exceptions maybe invoked *only where a genuine and sufficiently serious threat* is posed to *one of the fundamental interests of society*.⁴⁵ (Emphasis added.)

Although the scope is not clearly defined, the interpretation of ECJ and the BIT indicates that the existence of a genuine and sufficiently serious threat to the fundamental interests of society can be the determinant for the legitimacy of the measure concerned. In line with this understanding, the OECD 2009 report also notes that although the ECJ admitted that, depending on the situations, some concerns regarding public policy might legitimise certain government's undertakings, it underlines the importance of a narrow and restrictive interpretation of public order and established that economic grounds could not justify any measures to prevent the free

⁴⁰ Ibid pp. 7-8.

⁴¹ Case C-54/99, *Eglise de Scientologie v. France* [2000] ECR I-01335 ("measures must provide clear indications as to the specific circumstances in which the measure will be applicable"); Case 153/78, *Commission of the European Communities v. Germany* [1979] ECR 02555 ("...cannot reserve an exclusive area of competence for Member States"); Case 36/75, *Rutili* [1975] ECR 1219 ("[derogations] cannot be invoked to service economic ends"); See, in addition, the Court's judgments in Case 7/61, *Commission v Italy* [1961] ECR 317 and Case 72/83, *Campus Oil* [1984] ECR 2727.

⁴² Case C-369/96, *Arblade* [1999] ECR I-08453, para 30.

⁴³ Ibid para 60.

⁴⁴ Case 30/77, *Regina v. Pierre Bouchereau* [1977] ECR 1999, para 35.

⁴⁵ Article 16 (d) of Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment (2002).

movement of capital.⁴⁶ In *Eglise de Scientologie*, the ECJ stated that “...those derogations must not be misapplied so as, in fact, to serve purely economic ends”⁴⁷, by denouncing any measure used as economic grounds to create a barrier to the free movement of capital. Similarly, in *Campus Oil*, by explicitly stating that public policy must be “interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure (the EC Treaty)”,⁴⁸ the ECJ has sought a narrow interpretation of public policy to prevent arbitrary derogations.

The tribunal of *Continental*, one of the Argentine cases, attempted to define public order. The tribunal states that “...public order is intended as a broad synonym for public peace, which can be threatened by actual or potential insurrections, riots and violent disturbances of the peace.”⁴⁹ Therefore, actions were necessary to prevent disturbances that can threaten social peace and legal order.

The analysis of public order in international, regional and national frameworks shows that public order has been used in diverse contexts with a meaning that can be country-specific. However, although public order (public policy in EC law) involves contexts which are different from essential security interests, they share certain requirements. For the invocation of such clauses, there should be a certain serious threat or distress to a social framework which gives rise to adverse effects on essential or fundamental interests of society or state. Therefore, it is challenging to determine if the scope of public order is narrower than security or vice versa, or even if public order and essential security interests exist in different categories when it comes to application and interpretation.

2.3. National Security and Essential Security Interests

Contrary to the dynamic between public order and essential security interests, it is even more complicated to differentiate essential security interests from national security. The Argentine government referred to essential security interests in the Argentina-US

⁴⁶ Case C-367/98 *Commission v. Portugal*, ECR [2002] I-04731, para 52.

⁴⁷ *Eglise de Scientologie*, *supra* note 42, para 17.

⁴⁸ *Campus Oil*, *supra* note 42, paras 32-37.

⁴⁹ *Continental Award*, *supra* note 8, para 174.

BIT. The BIT adopts the expression of essential security interests rather than national security. The preference of adopting essential security interests over national security is prevalent in IIL. For example, Article 3 of the OECD Codes of Liberalisation of Capital Movements 2013 takes the same approach.

Article 3. Public Order and Security

The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:

- i) the maintenance of *public order* or the protection of public health, morals or safety;
- ii) the protection of *essential security interests*; or
- iii) the fulfilment of its obligations relating to international peace and security. (Emphasis added)

Article 3 (Public Order and Security), in similar terms with the Argentine-US BIT, uses the term “essential security interests” rather than national security. On the contrary, Article 2.3 of the BIT between Hungary and the Russian Federation (1995) adopts the term “national security” among other emergency situations, and provides:

This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, *national security* and public order, protection of the environment, morality and public health.⁵⁰ (Emphasis added.)

This contrast then begs the question whether there is a meaningful difference between national security and essential security interests.

According to the findings in the OECD 2009 report, while the terms essential security interests and public order have frequently been incorporated in IIAs, the term “national security” has rarely appeared in IIAs.⁵¹ Rather, national security is more likely to be used in national security strategy (NSS) reports, as will be shown in Chapter 3 regarding the examination of security policies. Threats that appear in NSS reports focus mostly on terrorism, WMD, attacks by foreign countries, global pandemics,

⁵⁰ Article 2.3 of the BIT between Hungary and the Russian Federation (1995).

⁵¹ OECD, 2009, *supra* note 29, p. 6.

natural disasters and man-made emergencies as well as energy security, failed states and organised crime in the absence of security issues pertinent to an economic crisis or foreign investment.⁵² This may indicate that the term national security is preferred in ‘national’ reports rather than in ‘international’ agreements.

By examining the security exception clauses of different BITs, it can be also found that essential security interests and national security do not coexist in one article. This may mean that they share the same scope of situations. Another hypothesis could be that removing ‘national’ in national security may be intended to diversify referent objects to secure such as individuals, governments and societies as well as nations. The UNCTAD in its report also poses a similar question whether the two terms cover the same circumstances or if there is any fundamental difference between them.⁵³ It could be contended that the term essential can result in making the scope of essential security interests narrower than that of national security. However, the UNCTAD report suggests that it is not evident that Contracting Parties intended such a distinction by choosing between essential security interests and national security, and called for further clarification by arbitration tribunals.⁵⁴ Yet, unless there is a situation where a state invokes both national security and essential security interests, which is highly rare – since BITs or IIAs do not incorporate the two terms in the same exception – dispute settlement bodies are less likely to distinguish the terms. Despite the difficulty in clarifying the distinction between the two terms, it can be argued that, by adding ‘essential’ to security, contracting parties may wish to safeguard their measures to protect certain interests during their emergencies with additional shields. According to the Oxford Dictionary, essential means “absolutely necessary; extremely important; fundamental or central to the nature of something.” Thus, provided that ‘essential’ security interests are at stake, a state should take measures to protect national interests which are fundamental or central to the nature of the state. As mentioned in Chapter 1, by a speech act that security agents give a label of security, a state declares that a particular issue becomes securitised, thereby legitimising extraordinary governmental measures. Likewise, a state can retain regulatory space to define what is essential by

⁵² Ibid p. 11.

⁵³ UNCTAD, ‘The Protection of National Security in IIAs’, UNCTAD Series on International Investment Policies for Development, New York and Geneva, *UN*, 2009, (UNCTADDIAE/IA/2008/5), p. 73.

⁵⁴ Ibid.

labelling national interests as such. This can be utilised as an impregnable excuse for a state to be exempted from its international obligations as long as they meet the requirements for invocation of the exceptions. Yet, it is unclear if the addition of essential was devised out of such intention.

The distinction between national security and essential security interests is not addressed in the awards of the Argentine cases since the clause invoked provides for essential security interests and no claim for clarification of the distinction was requested. Rather, the tribunals showed a certain relationship between a necessity exception and an essential security interest exception. The next section will demonstrate how the tribunals interpreted necessity and essential security interests in the Argentina-US BIT. It will also interrogate if the emergency measures taken by the Argentine government were justifiable.

2.4. The Tribunals' Awards

The Argentine government, the respondent in the cases, claimed that the state should be exempted from liability on the grounds of a state of necessity under customary international law or public order and essential security interests in the BIT for the emergency measures against its crisis. Accordingly, in *CMS*, *Enron*, *LG&E* and *Continental Casualty Company*, the tribunals examined if the emergency measures were implemented to protect Argentina's essential security interests. The tribunals discussed the scope of Article XI of the BIT, the essential security interests exception and found that essential security interests are not limited to military or political concerns,⁵⁵ but take major economic crises into consideration.⁵⁶

As mentioned above, because the justification of the emergency measures taken by Argentina hinges upon necessity under customary international law as well as essential security in the BIT, the tribunals found that a state of necessity is relevant to essential

⁵⁵ *CMS Award*, *supra* note 6, paras 359-360.

⁵⁶ In Chapter 1, it was discussed that the Copenhagen School, the Constructivist School questioned the limited approach to security only focusing on military security, expanding the scope of security to political and economic issues. See further Chapters 1.2.2, 1.2.4.

security interests in the BIT, and analysed if the claim should be legitimised as an essential security interest based on the conditions of necessity.⁵⁷

The International Law Commission (ILC) outlined the requirements for a state to invoke necessity in Article 25 of Draft Articles on Responsibility of States for Internationally Wrongful Acts. First, necessity may not be invoked unless the act is “the only” means available for the State “to safeguard an essential interest from a grave imminent peril.”⁵⁸ This condition is strengthened by the ILC Committee on State’s Responsibility stating that the “essential state interest” for the invocation of necessity should be an interest which directly relates to a state’s “political or economic survival,⁵⁹ the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.”⁶⁰

The second condition is that the act should not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Third, if the State has contributed to the situation of necessity, necessity may not be invoked.⁶¹ The ILC in its comments clearly expresses that “necessity will only rarely be available to excuse non-performance of an obligation [...] and subject to strict limitations to safeguard against possible abuse”.⁶² Also, the claim cannot be justified if there is either explicit or implicit exclusion of necessity on the agreement.

By imposing stringent conditions for invoking necessity, the ILC attempts to lower the possibility for necessity to be invoked. However, the scope of necessity is not clearly restricted. As mentioned above, the ILC Committee did not confine the scope to a certain national concern but rather took into account economic, political and ecological

⁵⁷ OECD, *International Investment Perspectives: Freedom of Investment in a Changing World*, Paris: OECD, 2007, Chapter 5 (especially, p. 102).

⁵⁸ Article 25 of International Law Commission (ILC), Draft Articles on State Responsibility, U.N. Doc. A/56/10 and Corr.1, 2001.

⁵⁹ The ILC’s approach to necessity is in the same line of the Copenhagen School’s definition of security in that the ILC stated that the interest should be directly pertinent to a state’s political and economic survival.

⁶⁰ UN, ‘Report of the Commission to the General Assembly on the work of its Thirty-Second Session’, *Yearbook of the International Law Commission*, vol. 2, Part 1, A/CN.4/SER.A, 1980.

⁶¹ OECD, 2009, *supra* note 29.

⁶² *Ibid.*

importance as vital interests. This understanding can be found in the *Gabcikovo-Nagymaros* case. The case concerned a joint investment project between Hungary and Slovakia to produce hydroelectricity in Hungary by building a dam. Although Slovakia fulfilled its obligation, Hungary attempted to terminate the contract by claiming that the project would cause ecological risks such as artificial floods and extinction of various flora and fauna. After the continuing conflict, they submitted the dispute to the International Court of Justice (ICJ). The ICJ held that the Gabcikovo-Nagymaros project having a possibility of ecological damage could cause an imminent peril,⁶³ although it concluded that the Hungarian governmental action, that is, the abandonment of the project, was not the only way to protect its essential interest.⁶⁴

In the case of *CMS* and *Enron*, the tribunals examined, drawing upon the conditions of necessity, (i) if Argentina had contributed to the emergency situation, and (ii) if the governmental measure seriously impaired an essential interest of the party towards which the Argentine international obligation exists. The tribunals believed that Argentina's contribution to the severe emergency situation was substantial and the measures in question seriously damaged the essential interest of the Claimants.⁶⁵

On the contrary, the *LG&E* tribunal held that Article XI of the BIT sufficed to address Argentine government's implementation and that the measures were also in conformity with conditions of necessity. It also concluded that Argentina did not contribute to the emergency and "the only means available" in Article 25 indicates that a government has no choice but to act.⁶⁶ In *Continental*, the tribunal noted an essential security interests clause "as a specific provision limiting the general investment protection obligations...bilaterally agreed by the Contracting Parties, is not necessarily subject to the same conditions of application as the plea of necessity under general international law"⁶⁷ and referred to Article XX of GATT 1947 under the WTO as both the BIT and the GATT deal with the context of economic measures.⁶⁸ In terms of severity of emergency that can justify a security measure, the *Continental* tribunal held

⁶³ The case concerns a joint investment project to produce hydroelectricity. Hungary claimed that the project would cause ecological risks such as artificial floods, and extinction of various flora and fauna.

⁶⁴ *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*, ICJ GL No. 92, 1997, paras 44-45.

⁶⁵ *CMS Award*, *supra* note 6, para 329; and *Enron Award*, *supra* note 9, para 342.

⁶⁶ *LG&E Decision*, *supra* note 5, para 239.

⁶⁷ *Continental Award*, *supra* note 8, para 167.

⁶⁸ *Ibid* paras 192-193.

that essential security interests in Article XI of the BIT does not require total collapse of the country or a catastrophic situation that has already occurred as long as there is “powerful evidence [that the crisis] could not be addressed by ordinary measures.”⁶⁹ Lastly, the *Continental* tribunal noted that the measures are justified by necessity within the meaning of BIT as there were no alternatives available.⁷⁰

Although interpreting “the only means for the State” in Article 25 of the ILC’s Draft Articles on State’s Responsibility is different from judging whether or not Argentina had contributed to the situation, all the Argentine cases’ tribunals concurred that excluding economic crises from the scope of Article XI (essential security provision) leads to an unbalanced understanding of the article.⁷¹

To sum up, the ICSID tribunals recognised the economic aspect of security noting that economic security is as vital as military security. Depending on the tribunals’ approach, the distinction between necessity and security claims can be either clearer or trivial in the Argentine cases. If the conditions of necessity under customary international law should be applied to an essential security claim exactly, the invocation of the latter is to be justified only if the government measure in question is the only means available to the government. Since the thresholds of necessity are very high so that states can utilise necessity as a last resort, given that different concerns from environmental to societal appear as security interests, it remains a question if the conditions of necessity should be met to invoke essential security, especially in a situation where the interpretation of “the only means available” is controversial. Moreover, a state of necessity for international investment disputes can be invoked, unless an agreement explicitly or implicitly excludes the application of necessity. Therefore, the intention to include an essential security interests clause or national security clause in IIAs in addition to the option to invoke necessity may imply that there shall be certain difference in the application of necessity and national security or that states wish to secure their policy-space while giving up some by concluding international agreements. To shed light on the difference between essential security

⁶⁹ Ibid para 180.

⁷⁰ Ibid paras 204-205.

⁷¹ *CMS Award*, *supra* note 6, para 360; *Continental Award*, *supra* note 8, paras 173-174.

interests in IIAs and necessity in general international law, the next section discusses necessity more in-depth.

2.5. Necessity

The history of necessity for a state to derogate from its international obligations is long. As military security was predominant in the realm of national security, the doctrine of necessity initially started as a means of military self-defence. In a situation where a government has to act in self-defence, a necessity of self-defence must be “instant, overwhelming, leaving no choice of means and no moment for deliberation.”⁷² A state of necessity “permits an otherwise illegal act in an emergency not of the perpetrators’ making and with severe consequences if the act is not done.”⁷³ This implies a state may invoke necessity to protect its vital or essential interests by derogating from its international obligations during an emergency period. As the concept of security has evolved, the scope of necessity has also expanded from military to other fields, just as the ILC Committee on State’s Responsibility confirms.

There has been an attempt to draw a line between necessity and an essential security interest, but, their application, in reality, can be combined. The Argentine cases tribunals referred to Article 31 of the Vienna Convention on the Law of Treaties to interpret the case aligned with any related agreements, that is, in case of an essential security interest, necessity can be relevant customary international law. Although the *LG&E* tribunal understood necessity and essential security as two separate claims, it still referred to necessity to interpret Article XI of the BIT as relevant law. This shows that necessity can play a complementary role, if not more. For both defences, the discretion to decide if the situation needs an emergency measure belongs to a state, unless a treaty specifies otherwise. The essential security interests provision seems to give carte blanche to each government to take any measures which a state considers necessary for the protection of national security. However, adjudicative bodies will eventually have teeth to decide if the measures were appropriate or if the situation

⁷² State Secretary Daniel Webster, *British and Foreign State Papers* 29, 1840-1841, p. 1129, cited in J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002.

⁷³ J. R. Fox, *Dictionary of International and Comparative Law*, 3rd edn., New York: Oceana Publications, 2003, p. 226.

amounted to threats to an essential security interest from their perspectives. Also, the strict requirements of exceptional clauses prevent states from excusing the violation of their obligations. Since, in most cases, a measure or action taken by a government fails to protect foreign private entities, so as to justify a necessity claim, the interests which are to be protected by sacrificing the private entities' interests, should have higher values. For this reason, necessity claims are highly likely to have two faces. Firstly, to strike a balance between foreign investors' rights and a state's essential interests by retaining certain regulatory space. Secondly, to excuse its measures for protectionism against foreign investors.

In addition to the ICSID tribunals' interpretation of necessity, the World Trade Organisation (WTO) panels and the WTO's Appellate Body (AB) have also interpreted the concept of necessity.⁷⁴ The interpretations necessity by the WTO panels and the AB are not confined to the narrow scope, but cover a comprehensive understanding.⁷⁵ Although the thresholds for a state to invoke a necessity defence are very high, both institutions have developed ways to enable invocation of necessity.⁷⁶ Before engaging with the WTO's interpretation on necessity, it is imperative to note the related articles under the WTO system. Article XX of the General Agreement on Tariffs and Trade (GATT) specifies general exceptions:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) ...

⁷⁴ C. C. Galvez, 'Necessity, Investor Rights, and State Sovereignty for NAFTA Investment Arbitration', *Cornell International Law Journal*, vol. 46, 2013, p. 145.

⁷⁵ A. Alvarez-Jimenez, 'New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law', *American Review of International Arbitration*, vol. 19, no. 3, 2008, p. 468.

⁷⁶ Ibid p. 465.

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices. (following paragraphs omitted)

In addition to Article XX, Article XXI of the GATT provides security exceptions:

Nothing in this Agreement shall be construed,

- (a) ...
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) ...

One of the differences between Article XX and Article XXI is the existence of the chapeau. While measures based on general exceptions are subject to the requirements that they must not be applied in an arbitrary or discriminatory manner and that they should not be used as a protectionist tool, Article XXI on security exceptions does not have this chapeau. This means that government measures according to security exceptions in GATT Article XXI can be applied in a discriminatory or arbitrary manner. However, the essential security interests illustrated in this article are very narrowly defined, with focus only on military security. Since the article was drafted in a way to minimise trade restrictions and curb protectionism with a narrow approach to

security, such requirements are absent to allow states to implement measures against severe military threats or any relevant threats. For the contemporary understanding of necessity, Article XX appears more relevant to the extent that it involves national regulatory space by referring to “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.” The application and interpretation of Article XX can be found in the *Korea – Beef* case. In this case, the Korean Government took measures which affected the importation, distribution and sale of beef from the US and Australia in relation to Korea’s dual retail system on beef. The dual retail system allows for a separate sale regime for domestic beef and imported beef. Korea contended that the dual retail system was necessary to secure Korea's Unfair Competition Act. Against these measures, Australia and the US claimed that Korea violated GATT Article 3.4 (National Treatment).

In the *Korea – Beef* case, the WTO AB explained the meaning of “necessary” on GATT Article XX (d):

We believe that, as used in the context of Article XX(d), the reach of the word “necessary” is not limited to that which is “indispensable” or “of absolute necessity” or “inevitable”. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term “necessary” refers, in our view, to a range of degrees of necessity. At one end of this continuum lies “necessary” understood as “indispensable”; at the other end, is “necessary” taken to mean as “making a contribution to”. We consider that a “necessary” measure is, in this continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to”.⁷⁷

The WTO AB added that “necessary” requires the weighing and balancing of regulations, calculating to what extent the measures contribute to law enforcement and

⁷⁷ WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R, December 11, 2000, para 161.

how significant the interests and values which are to be protected are by influencing the law on trade. It also requires that a contracting party needs to devise a measure which is the least trade restrictive.⁷⁸ The AB found that the dual retail system was not justified as a necessary measure to secure compliance with the Korean national law in question because the system did not have necessity under the meaning of Article XX(d). It noted that Korea failed to show that alternative measures would not achieve the end. This AB's approach is reiterated in *Brazil – Retreaded Tyres*⁷⁹ where the AB found that the Import Ban on retreaded tyres could be considered “necessary to protect human, animal or plant life”⁸⁰ based on weighing and balancing test. The necessity test is also discussed in the *EC – Asbestos* case. The AB held that “the more vital or important the common values pursued, the easier it would be to accept as “necessary” measures designed to achieve those ends.”⁸¹ As the values pursued in this case were related to human life and health, the AB found that the prohibition on asbestos would fall within the meaning of necessity.⁸²

The interpretation of the WTO AB provided a guideline to better understand necessity in the article insofar as the measures could be taken in the event of *not absolute necessity* although it was found that a necessary measure should be closer to “indispensable” rather than to “making a contribution to”. To some extent, this may lower the thresholds so as to invoke necessity regarding the measures that a government can implement. This interpretation approach to necessity may be caused by the desire for the WTO AB to make the exception article more viable so that states can utilise it, only if *necessary*. Whereas a state of necessity under customary international law shall be invoked to safeguard an essential interest from a grave imminent peril, necessity of Article XX contributes to harmonising national law with

⁷⁸ Ibid paras 164, 166.

⁷⁹ WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R, December 3, 2007, para 141.

⁸⁰ Ibid para 212.

⁸¹ WTO, *EC – Measures Affecting Asbestos and Asbestos-containing Products*, Report of the Appellate Body, WT/DS135/AB/R, March 12, 2001, para 172.

⁸² Ibid para 175. In addition to those cases, in *Thailand – Cigarettes (Philippines)*, the AB evaluated the necessity of customs and fiscal measures on cigarettes from the Philippines, which are inconsistent with national treatment. By referring to the Korea – beef case, the AB held that it would be necessary to consider whether a WTO-consistent alternative measure to the Member was available (footnote 275) and concluded that the measure was not justified on the grounds of necessity (para 223). See further, WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body, WT/DS371/AB/R, June 17, 2011.

the WTO system by securing some policy-space instead of examining urgency of the issue. Despite this distinction, both exceptions aim at the least restrictive measures in order to diminish a negative influence on the interests of the states whose obligations are exempted.

In conclusion, although the WTO AB's interpretation of necessity cannot be directly applied to necessity under customary international law, the AB's lenient approach to necessity has broadened the ambit of necessity to some degree and helped provide a better understanding for necessity.

3. Conclusion

The examination of Argentine cases demonstrated the different approaches of foreign investors and host states to the concept of essential security interests in the IIL realm. It also underscored that the tribunals' approach to interpreting the meaning and scope of security interests. The Argentine cases tribunals acknowledged the economic aspect of national security in IIAs, noting that excluding economic security from the scope of national security may well lead to an unbalanced understanding of the security exception clause. This is because the consequences of an economic crisis is as grave and imperilling as those arising from military threats or social and political instability. The relationship between public order and essential security interests was also addressed. Examining public order in domestic and international settings shows a certain overlap with security exceptions in IIAs to the extent that both of them may be invoked only where a serious threat impacts the essential interests of society or a state.

Necessity played a vital role in the tribunals' interpretation of security in the Argentine-US BIT. The tribunals' interpretation even markedly differed on the meaning of "*the only means*" available among conditions for invocation of necessity and in the attitude over the relationship between necessity and essential security interests. The question is whether if essential security interests should comply with necessity requirements or if necessity requirements complement the interpretation of the exception. The controversial interpretation of the requirement led to the different conclusions in the awards. This phenomenon calls for further clarification of the condition and of the relationship between necessity and security exceptions. Although

the tribunals took divergent approaches, they all acknowledged the close relationship between necessity and security exceptions.

The WTO AB's interpretation of necessity helped to understand the concept of necessity insofar as the AB did not confine the scope of necessity to an absolute necessity or the indispensable. The WTO AB's finding helped in expanding the latitude of necessity, thereby lowering the high threshold of invoking necessity and making the exception more viable. Since the objective of the WTO is to pursue free trade and economic liberalisation in the global economy, the agreement was drafted in the manner which reduces implementing trade restrictive measures to a minimum. Given this feature, the WTO dispute settlement bodies attempt to clarify the meaning of terms and apply their interpretations to claims in disputes through a weighing and balancing approach.

CHAPTER 3

Security in Foreign Investment Policy and Security Strategy Reports and Government-controlled Investment

1. Introduction

The discussion in Chapter 2 examines how international tribunals have interpreted essential security interests in IIAs. It also underlines the broadening of the concept of security to include economic considerations. The economic considerations are not limited to economic prosperity, but include the protection of critical infrastructures and domestic strategic industries.¹

Following the 9/11 attack, James K. Jackson argued that the concept of national security in the US dramatically changed, leading to a change in attitudes not only regarding security policy in general, but also to foreign investment policy on critical infrastructures.² The belief that foreign ownership of national critical infrastructures may render a country more vulnerable to external attacks propelled the initiative. The analysis of countries' national security strategy reports in the previous chapter showed the role that critical infrastructures play in society and governments' reservations. In the past, critical infrastructures played a minor role in the domain of national security because the main focus was placed on military security. However, as a new type of investors emerged, such as those sponsored or controlled by foreign governments, states became more protective towards critical industries which affect vital national interests. This concern is an offshoot of the perception that decisions of foreign companies can be an extension of their home government's policy drive, rather than the pursuit of companies' profits. For example, Gazprom, the Russian energy company, stopped gas supplies to Ukraine in 2006, which was interpreted as a decision motivated by political considerations.³ This implies the possibility that the operation

¹ In this thesis, critical infrastructures and critical industries are used interchangeably. The reason why both of them are used is because some critical industry can be a strategic industry rather than a critical infrastructure. Nevertheless, their importance in countries' policy is equally high.

² J. K. Jackson, 'Foreign Investment and National Security: Economic Considerations', *Congressional Research Service*, April 4, 2013, p. 15.

³ J. Stern, 'Natural Gas Security Problems in Europe: The Russian-Ukraine Crisis of 2006', *Asia-Pacific Review*, vol. 13, no. 1, 2006, p. 32.

of industries, in particular those providing public services, can be interrupted when a diplomatic or political conflict occurs between a host state and a home state. In parallel with this development, host states have become significantly protective of such industries by preventing foreign investments in those industries.

As regards protecting critical infrastructures, host states became agitated with several attempts by foreign investors, especially investors owned or controlled by foreign governments, to acquire local businesses in critical industries. For instance, Dubai Ports World, owned by the United Arab Emirates, planned acquisition of a company which operated US ports in 2006.⁴ In the end, Dubai Ports World sold its business operating the ports to AIG Global Investment Group, an American company which lacked any experience in ports operations. Similarly, in 2005, the US hindered CNOOC, the Chinese national oil company, from acquiring the US energy firm Unocal on the national security grounds, including the risk of technology leakage. In addition, the French government also blocked the acquisition of Suez by ENEL, the Italian electricity and gas company whose major shareholder is the Italian government (25.5%) in 2015. Although Suez merged with Gaz de France, a French company, which was promoted by the French government, and became Gaz de France and Suez,⁵ the issue of foreign ownership, especially foreign investment which is owned or controlled by government have raised national security concerns.

This chapter will demonstrate how the concept of national security has been applied to investment policy in European countries and North American countries. Certain cases will be reviewed, to delve into US policy and to explore how countries define critical industries in their policy regarding foreign investment, given that the concept of critical industries is akin to national security. Given the significant effect of such investment in national security and critical infrastructures, the concept of foreign investment, which is controlled or owned by a foreign government, will be examined. Before the examination of policies in relation to critical infrastructure and GCIs, in order to assess the evolving perception of security by states and the relationship

⁴ Council on Foreign Relations, 'Foreign Ownership of US Infrastructure', Feb 13, 2007, <http://www.cfr.org/business-and-foreign-policy/foreign-ownership-us-infrastructure/p10092>, (accessed May 3, 2018).

⁵ UNCTAD, 'The Protection of National Security in IIAs', *UNCTAD Series on International Investment Policies for Development*, UN, New York and Geneva, 2009, (UNCTADDIAE/IA/2008/5), p. 11.

between national security and critical infrastructure, this chapter explores various countries' national security strategy reports.

2. Security as an Evolving or Static Concept in National Policies?

Following the Second World War, states began to question the narrow approach to security, which focuses only on military security, and to rethink ways to achieve international peace,⁶ such as increasing economic dependency and establishing powerful international organisations.⁷ And apart from economic dependency, developed countries deemed the economic aspects of security and stability relatively immaterial since their economies prospered during the second half of the 20th century. Rather, the developed countries regarded their economy as a major instrument of diplomacy in international relations, thereby using their economic resources to expand their influence.⁸ Because economic stability is a prerequisite for a country to achieve political and societal stability, countries, particularly, market-sensitive economies, are vulnerable to economic coercion. Economic sanctions – such as imposing a higher rate of tariffs or banning exports of essential goods to countries which are regarded as causing international disruptions – have been a preferred way to resolve conflicts, as powerful countries were unwilling to use military force to tackle such disruptions.⁹ The powerful countries, especially the US, continue to believe that building greater military power and alliances and prioritising military security over other types of security considerations were the prerequisites to counter interstate military threats as well as to ensure national and international security.¹⁰ This belief was based on the claim that alliances with great military security and economic dependency would facilitate international peace.¹¹ Notwithstanding, the 9/11 terrorist attack in 2001

⁶ D. A. Baldwin, 'Security Studies and the End of the Cold War,' *World Politics*, vol. 48, no. 1, 1995, pp. 123-5.

⁷ K. W. Abbott and D. Snidal, 'Why States Act through Formal International Organizations', in P. F. Diehl (ed.), *The Politics of Global Governance: International Organizations in an Interdependent World*, 3rd edn., Lynne Rienner Publishers, 2005.

⁸ M. P. Doxey, *Economic Sanctions and International Enforcement*, London: Palgrave Macmillan, 1980; P. Liberman, 'Trading with the Enemy: Security and Relative Economic Gains', *International Security*, vol. 21, no. 1, 1996.

⁹ E. S. Rogers, 'Using Economic Sanctions to Control Regional Conflicts', *Security Studies*, vol. 5, no. 4, 1996, p. 43; G. A. Lopez and D. Cortright, 'Economic Sanctions in Contemporary Global Relations', in D. Cortright (ed.), *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World?*, Routledge, 2018.

¹⁰ R. F. Weigley, *The American Way of War: a History of United States Military Strategy and Policy*, Indiana University Press, 1977.

¹¹ H. D. Lasswell, *National Security and Individual Freedom*, New York: McGraw-Hill, 1950. Especially, on p. 75, Lasswell argues that "our greatest security lies in the best balance of all instruments

altered the global predominant view that international peace could be achieved by diplomacy and economic interdependence through economic sanctions.

Recent trend illustrates that the economic aspect of security has become multi-faceted more than a situation involving economic diplomacy. For instance, terrorist groups cannot be dealt with by interstate economic sanctions because their finance relies on transnational and illegal economic resources such as arms trafficking. In addition, states started to pay close attention to ‘critical infrastructures’. Although the scope of critical industries by each country varies, countries share the fear as to whether their critical infrastructure would be adversely affected by a certain threat.¹² This could be either a military attack on critical industries or takeovers of such industries by foreign investors with particular nationalities. This can become worse in a situation where a terrorist group is, in any way, connected to a home state’s government which has control over critical industries. Accordingly, the foreign ownership of industries with national essential security interests can pose a potential threat to a host state. Thus, the host state can ensure neither military security nor socio-economic security. This discourse is not confined to a terrorist group. Where a foreign government owns or sponsors an industry which is essential to another country – for instance, by means of a take-over – the situation can be assumingly used as political leverage. That is why contemporary issues are not always able to be solved by normal diplomacy.

This concern can be found in the US economic policy about foreign investment. Despite its leading role to spread the value of neoliberalism and market deregulation, there are a few industries in the US which foreign investors are not allowed to invest in. This is because control over such industries has a vital effect on essential security interests of the US.¹³ Notwithstanding, those restrictions are applied to mainly mergers, acquisitions and take-overs rather than new establishments (Greenfield investment).¹⁴ According to the Organisation for Economic Co-operation and Development (OECD) report on “Protection of ‘Critical Infrastructure’ and the Role

of foreign policy, and hence in the coordinated handling of arms, diplomacy, information, and economics.”

¹² The analysis on the relationship between critical infrastructure and security can be found in Chapter 3.4. National Security in Domestic Investment Law and Critical Infrastructure.

¹³ This will be further discussed in Chapter 3 on the US’s restriction on foreign investment.

¹⁴ J. K. Jackson, ‘Foreign Investment and National Security: Economic Consideration,’ *Congressional Research Service*, April 2013, p. 15.

of Investment Policies Relating to National Security”,¹⁵ strategies on national security cover not only the roles of a government, such as accountability and transparency, but also highlight private sectors’ roles on critical infrastructure.¹⁶ While countries have vigorously presented their concerns on certain types of security, such as border security and energy security, most countries do not include investment policy-making in their national security strategies. Exceptionally, France and the US mentioned the role of investment policy-making in their plans, but the significance of other roles takes precedence over that of investment policy roles.¹⁷

In addition to economic aspects of national security, security concerns have been diversified ranging from spread and use of Weapons of Mass Destruction (WMD) through space security, climate change and global infectious disease to cybersecurity.¹⁸ This is because different types of threats emerged to the extent that different subjects of threats, such as transnational terrorist groups, other than states have been regarded as threats. Additionally, risks have been included in the discourse of threats since the scope of threats has been widened.¹⁹ Put differently, threats include not only a present threat but also a risk which has not yet occurred, but has the possibility to bring about a grave effect on the society. The following sections will demonstrate this in detail by focusing on specific countries and the EU.

2.1. United States

In the report of ‘US National Security Strategy (NSS) 2015’,²⁰ the security concerns of the US are illustrated, ranging from threats, its national prosperity and values that the US aims to protect. The scope of national security involves terrorism, its capacity to counter dangerous ideologies, mostly extremists and to prevent conflicts, WMD, climate change, space security, and global health security. The report does not merely state that the US is required to establish the systems to react and tackle threats at

¹⁵ OECD, ‘Protection of ‘Critical Infrastructure’ and the Role of Investment Policies Relation to National Security’, *OECD*, Paris, May 2008.

¹⁶ *Ibid* pp. 5, 6, 9.

¹⁷ OECD, ‘Security-Related Terms in International Investment Law and in National Security Strategies’, *OECD*, Paris, May 2009, p. 12.

¹⁸ European Union, ‘Report on the Implementation of the European Security Strategy’, Brussels, 11 December 2008, S407/08, p. 8

¹⁹ United States, ‘National Security Strategy 2015’, *the White House*, February 2015, p. 2.

²⁰ *Ibid*.

present, but also emphasises that the US needs to strengthen its ability to prevent outbreaks of those threats; threats which are happening at present are no longer the only concerns to deal with. Thus, based on the approach taken by the US, even if a risk has been neither specified nor certain, the US Government is willing to take actions which are considered as necessary to prevent the risk from becoming a real threat. Observing this trend leads to the conclusion that managing risk plays a pivotal role in contemporary American security.

Regarding managing risks, Tine Munk classified three related concepts: prevention, precaution, and pre-emption.²¹ According to her, prevention is the tool to stop events which are known through its previous occurrence from happening again or to minimise the possibility of occurrence of such events. The implementation of such measures against the potential events should be based on convincing evidence and information. Moreover, it should be certain that if measures are not taken, certain damage will occur. Therefore, prevention does not emphasise obtaining more information of risky events, because preventive actions are taken on the premise that scientific knowledge suffices to support such actions. The range of actions is also delineated to the extent that the risk is calculated based on clear knowledge, hence the adequate level of measures. On the contrary, precautionary actions may be taken without sufficient knowledge and certainty. The principle of precaution originated from the phrase “better safe than sorry”.²² In the precaution algorithm, waiting for sufficient knowledge is not a justifiable reason not to take precautionary actions because delaying such actions may well result in risks converting into threats.²³ The ramification of the potential risk is catastrophic, which makes actions justifiable to some extent despite the lack of knowledge and certainty while it is improbable to predict if damage will occur absent such actions. Further, Munk argues that precaution and pre-emption are closely linked insofar as pre-emption involves a drastic and

²¹ T. Munk, ‘Cyber-security in the European Region: Anticipatory Governance and Practices,’ PhD Thesis, University of Manchester, 2015, p. 90.

²² P. Sandin, ‘The Precautionary Principle and the Concept of Precaution’, *Environmental Values*, vol. 13, no. 4, 2004, p. 462. The legitimacy of precautionary action is based on the premise that “*nothing is safe, as long as it has not been proven harmless*”.

²³ J. Stern and J. B. Wiener, ‘Precaution against Terrorism’, *Journal of Risk Research*, vol. 9, no. 4, 2006, p. 397.

temporal type of precaution.²⁴ Just like precaution, pre-emptive decisions on risks are expected to be justified because the consequence of the risks is estimated unrecoverable. Governments have used the notion of pre-emption in order to prevent grave and imminent harms especially caused by military conflicts and wars as self-defence, leaving no choice of means and no moment for deliberation.²⁵ Given the catastrophic consequences of the 9/11 terrorist attack, the US has become keen on such anticipatory governance. By declaring the War on Terrorism, the US, during the Bush administration, adopted the logic of pre-emption although this decision generated controversies and criticisms that the threat was not sufficiently imminent to initiate a pre-emptive war.²⁶

In the past, the US believed that its great military and economic power would protect it from external dangers.²⁷ However, terrorists who operate with a small scale of military forces that can give rise to disastrous results made the US not rely on such power any longer. The NSS 2002 report,²⁸ which was published after the 9/11 attack, mainly focuses on terrorist threats and military security. The report justifies the preventive and pre-emptive actions against an imminent threat, especially terrorists, “to prevent them from doing harm against our people and our country”.²⁹ The US has prioritised combatting threats posed by terrorism, given that its most imminent threat has been an attack from a terrorist group since the government and its citizens confronted the grave result of the 9/11 attack. On the other hand, the report made a remark on energy security, alliance and economic growth through free markets and free trade, but it does not refer to any economic security, such as economic stability or the importance of improving critical infrastructures in the US.³⁰

²⁴ B. Heberton and T. Seddon, ‘From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age’, *British Journal of Criminology*, vol. 49, no. 3, 2009, p. 345.

²⁵ Especially the United States, since the 9/11 terrorist attack, has highlighted pre-emptive actions alongside with risk management; yet many other countries such as the UK also began to incorporate risk management in their security strategy reports and policies.

²⁶ G. W. Bush, ‘Address to the Nation on the September 11 Attacks’, *Selected Speeches of George W. Bush 2001-2008*, Washington, D.C., September 11, 2001, p. 58.

²⁷ Lasswell, 1950, *supra* note 8.

²⁸ United States, ‘National Security Strategy 2002 of the United States’, the White House, September 2002.

²⁹ *Ibid* p. 6.

³⁰ *Ibid* p. 19.

On the contrary, the 2001 NSS report³¹ before the 9/11 attack takes an approach different from the 2002 report and the 2015 report. Although it stresses how imperative military security is for the US, and how the US should respond to increasing terrorist groups,³² it covers diverse security concerns such as preventing conflict, democracy, regional integration, sustainable development, and energy security as well as WMD.³³ The threats in this report include the proliferation of weapons, terrorism, drug trafficking, and potential threats to critical infrastructure, such as computer network attack, i.e. cyber-security.³⁴ The report points out that US's economic, social and military success hinges upon advanced information technology infrastructure. What is noteworthy is that the report acknowledges the importance of critical infrastructures in the US and further suggests a guideline to advance critical infrastructures,³⁵ which attests to the US's interest in the role of critical infrastructures in the American society.

The report divides American national interests into three categories: vital, important and humanitarian. One of the vital interests is "the protection of our critical infrastructures – including energy, banking and finance, telecommunications, transportation, water systems, vital human services, and government services [...]" from disruption which "cripples" their operation.³⁶ And it further remarked that for the sake of the protection of such interests, the use of military force, including unilateral action might be involved if necessary or appropriate. The second category, important national interests include environmental issues, infrastructure disruptions which destabilise, not cripple, smooth economic activity,³⁷ crises which could cause destabilising economic turmoil or humanitarian movement. Those particular interests may partly stem from the fact that the administration was the Democratic Party, which is interested in establishing a fundamental social system, while the administration during and after the 9/11 attack was the Republican Party that pursues non-

³¹ United States, 'National Security Strategy 2001: A National Security Strategy for a Global Age', the White House, December 2000.

³² Ibid pp. 7-11.

³³ Ibid p. 6.

³⁴ Ibid p. 12.

³⁵ Ibid pp. 30-32.

³⁶ Ibid p. 9 on "Protecting our National Interests".

³⁷ In this report, if infrastructure disruptions "cripple" economic activity, it is regarded as "vital" interests while if such disruptions "destabilise the economic activity, it is deemed as "important" interests.

governmental intervention in the market.³⁸ Therefore, the 2002 report placed emphasis on economic freedom and hence economic growth, whereas the 2015 report by the Obama administration which is the Democratic Party makes reference to the importance of developing infrastructures in economic security, underlining that critical infrastructure is imperative for further economic growth although it does not dictate how critical infrastructure should be fostered or what kind of measures will be taken against threats to critical infrastructure.

As shortly mentioned in the beginning, the 2015 report covered a variety of security concerns. In comparison to the 2010 NSS report, the 2015 report highlights the US's prioritisation for the top strategic risks to its interests: catastrophic attacks on the US homeland or critical infrastructure; threats or attack against US citizens abroad and its allies; global economic crisis or economic slowdown; spread of WMD; outbreaks of global infectious disease; climate change; significant energy market disruptions; and security issues arising out of failing states such as mass atrocities, transnational organised crime, etc., noting that the 2010 report aimed at dealing with current threats rather than focusing on risks.³⁹

Besides, whereas a robust military is considered a prerequisite to national security, the report stresses that building capabilities in science and technology is essentially required to gain an ascendancy over any adversary for sustainable national security.⁴⁰ This implies that certain industries which retain cutting edge technology and pertain to the high level of scientific development can be excluded from the free trade discourse.⁴¹

In preparation for potential economic crisis, the report claims that it is inevitable to reshape the economic order. The effort is accompanied by preventing the risky behaviour and addressing economic issues such as state capitalism (sovereign wealth funds, SWFs) and market-distorting behaviours.⁴² The 2015 strategy report does not mention ways to deal with state capitalism or certain types of economic protectionism. Rather, it stresses on the importance of the US obligation to protect the values of

³⁸ Importantly, the main reason for such difference is that the country had experienced terrorist attack.

³⁹ United States, 'National Security Strategy 2015', *the White House*, February 2015, p. 2.

⁴⁰ Ibid p. 8.

⁴¹ Ibid p. 15.

⁴² Ibid p. 17.

capitalism and neoliberalism to increase the efficiency and accordingly eradicate poverty.⁴³ The open market is one of the values which should be protected as a foundational regime of the US. That could be why the report does not cover solutions of economic (financial) crisis which may well taint the value of the US but rather attempts to devise a way to prevent such crisis with revised policy framework.

Furthermore, the gravity of military security is still far heavier in the report. The report outlines concrete strategies for national military defence, and discusses terrorist attacks and relevant issues in detail. However, regarding the economic dimension of security, it simply refers to economic prosperity and significance of critical infrastructures without including any concrete plans. It is evident that the US, regardless of time, tends to prioritise military security over other types of security and economic welfare has been deemed as a condition and means for further military security. Notwithstanding, while highlighting the military role in security, the NSS 2017 report, which was released following the election of Donald Trump, takes a clearly distinct approach from the previous ones insofar as the document suggests more explicit targets based on US interests.⁴⁴ The key objectives are as follows:

- (i) To protect the American people, the homeland, and the American way of life;
- (ii) To promote American prosperity;
- (iii) To preserve peace through strength; and
- (iv) To advance American influence.⁴⁵

The key objectives of the 2017 report overlap with those of the 2015 report regarding strengthening the military power and enhancing American prosperity. However, the 2017 report is more emphatic in highlighting the role of military power than the 2015 NSS report, by stating that the US will rebuild its military “so that it remains preeminent, deters our adversaries and if necessary is able to fight and win” and “advance American influence.”⁴⁶ Thus, this statement would denote the rebirth of

⁴³ Ibid p. 15.

⁴⁴ The expression of “America first” repeatedly appear in the NSS report.

⁴⁵ United States, ‘National Security Strategy of the United States of American’, December 2017, the White House, Washington, D.C., pp. 3-4.

⁴⁶ Ibid p. 4; such expression is not found in the NSS 2015 report.

traditional security approach.⁴⁷ While the report emphasises military security and economic prosperity, it does not discuss climate change. The report, however, proposes that the US will aim to oppose an energy agenda against economic growth that is “detrimental to US economic and energy security interests”.⁴⁸ Additionally, the report states that the US will take a more balanced approach for the protection of energy security, economic development, and environmental protection. Essentially, the priority is placed on developing the economy than countering climate change.⁴⁹ This shows that the economic aspect is more highlighted in the 2017 report than in the 2015 report in parallel with strengthening military power.

The chronological analysis of the US NSS reports shows that the attitude of the US security does not stagnate, but evolves. The evolution of security and threats in the US NSS reports can attest to the framing of security and threats by a speech act, as mentioned in Chapter 1. The society adapts to evolving threats, but the question remains as to how far the US is willing to embrace the evolving concept of security threats. The inclusion of “prosperity” in the NSS report demonstrates that national security and economic prosperity are closely connected. However, US attitude towards economic concerns is rather seen as neo-liberalism with de-regulation supported by the free market. The ethos of the US is market economy that removes inefficiencies in the global market.

2.2. European Countries

This section considers the United Kingdom, Germany and France under the European countries heading. The UK’s security service institution MI5 describes threats against national security and its role as “the protection of national security and in particular its protection against threats such as terrorism, espionage and sabotage, the activities of agents of foreign powers, and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means”.⁵⁰ The term “in particular” in the description shows that the list is not exhaustive, but illustrative. The

⁴⁷ See further Chapter 1.1. and 1.2.1. The Realist School.

⁴⁸ United States, NSS 2017, *supra* note 19, p. 22.

⁴⁹ The 2017 report places less emphasis on international security and more on national security, which is evidenced by the comparison of the number of references to “international”, 25 times in the 2017 report and 77 times in 2015.

⁵⁰ United Kingdom, Security Service Act 1989, Chapter 5, Article 1(2).

term “national security” is not clearly defined under UK law, but, according to the MI5, the term generally refers to the security and well-being of the UK as a whole, which does not necessarily suggest a better understanding. According to the MI5, the term “national security” intentionally is intentionally left undefined “in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances”.⁵¹ This approach is grounded on the premise that the meaning of security evolves and the scope of security broadens as circumstances change; hence, the UK has to act upon such changing circumstances.

The UK National Security Council published a document, “A Strong Britain in an Age of Uncertainty: the National Security Strategy 2010”⁵² and determined a priority list of risks to national security by tiers based on the possibility of occurrence and potential impact of risks. Tier One consists of international terrorism affecting the UK or its interests, hostile attacks upon British cyberspace, a major accident or natural hazard, and an international military crisis. Tier Two covers an attack on the UK or its Overseas Territories by another state – with chemical, biological, radiological or nuclear (CBRN) weapons; risk of major instability, insurgency or civil war overseas which can amount to threatening the UK; and severe disruption to information transmitted by satellites possibly as a result of a deliberate attack by another state. Tier Three comprises a large conventional military attack (not with CBRN), disruption to oil or gas supplies to the UK, short to medium term disruption to international supplies of resources.⁵³

The UK NSS report 2010 does not highlight any overt attempt to include economic concerns in the national security context. It is mainly a military-based notion focusing on terrorism, cyber-attack, and an international military crisis, although it refers to a major accident or natural hazard which can result in disruption to UK utility services including telecommunications, electricity, water or energy supplies. The document does not exclude the possibility of dealing with economic concerns in the context of security. However, by prioritising military threats, including terrorism and natural

⁵¹ United Kingdom, Security Service MI5, <https://www.mi5.gov.uk/home/about-us/what-we-do/protecting-national-security.html> (accessed September 10, 2016).

⁵² United Kingdom, ‘A Strong Britain in an Age of Uncertainty: The National Security Strategy’, HM Government, 2010.

⁵³ Ibid p. 27.

disasters, as fatal risks, the importance of other security concerns is diminished. Nevertheless, it shows its awareness of energy security by mentioning that the emergence of new powers, such as China and India, has heightened competition over rare resources,⁵⁴ which directly influences utility service industries. Moreover, including disruption to UK utility services in the category of Tier Three implicitly indicates the importance of energy security and the potential catastrophic consequence in the absence of it.

The UK formed the Joint Committee on the National Security Strategy in 2005 to discuss the previous NSS documents and to recommend way-forward for the UK regarding national security. The report of “The Next National Security Strategy 2015”⁵⁵ submitted by the Joint Committee argues that the NSS needs to address a wide range of questions by taking a broad approach to security.⁵⁶ This is because different types of threats and increasing economic instability called for a new approach to national security from many different angles. By widening the scope, resilience and preparedness can be achieved insofar as where the scope of national security is broader than military defence. Accordingly, the choice of measures to ensure national security should be wider than “military, diplomatic, development, intelligence and other hard security measures.”⁵⁷ This means that the incorporation of diverse security concerns can bring about increased preparedness in order to tackle new threats more promptly by supporting contingency planning.

Moreover, the report underlines energy security, referring to cases of Russia and the Middle East which have posed political and physical threats to energy supply in the UK due to Britain’s energy dependency.⁵⁸ Regarding the concern on energy security, the report states that the Prime Minister mentioned the National Security Council would be considering the issue of foreign ownership of energy infrastructure.⁵⁹ The report also shows concerns on economic shifts. Economic unpredictability and shifts in economic power given economic stagnation in the Eurozone have posed economic

⁵⁴ Ibid pp. 16, 21.

⁵⁵ United Kingdom, ‘The Next National Security Strategy 2015’, submitted by the Joint Committee on the National Security Strategy, HL Paper 114/ HC 749, March 2015.

⁵⁶ Ibid p. 10; United Kingdom, ‘The Work of the Joint Committee on the National Security Strategy in 2013-14’, HL Paper 169/HC 1257, para 43 and p. 13.

⁵⁷ See *supra* note 55, p. 14.

⁵⁸ Ibid p. 8.

⁵⁹ Ibid.

and political challenges.⁶⁰ Although the Joint Committee on the National Security Strategy is an advisory institution without the power to draft NSS reports or enforce measures about national security, its opinions on this report suggest the direction of improvement in the UK NSS and are taken into consideration for security policy. It is important to note that the report mentions that the UK Parliament is aware of concerns of foreign ownership over energy infrastructures caused by increasing instability in countries exporting oil or gas and the UK's energy dependency on such countries.⁶¹ This discourse may not be confined to energy infrastructure. It can include other critical infrastructures, such as water supply, transportation or telecommunication, which have a direct influence on national public interests and well-being of any country. Besides, since the 2008 global economic crisis, economic instability has become the common concern for most countries – even a country which does not have a volatile economy can be adversely influenced by another country's economy, due to economic dependency. And this has made countries more aware of foreign ownership of critical infrastructures and economic stability. Changes in economic powers and the international political system are also regarded as part of changing circumstances. For the UK to adapt to the current situation, the Joint Committee highlights the necessity of understanding the changing situation and embracing the new challenges and threats into the realm of national security policy.

There is a similar debate over security strategy in Germany. One policy suggestion, drafted by the CDU/CSU party⁶² on 7 May 2008, demonstrates new challenges to German national security. The document suggests that Germany should prepare a new security paradigm to respond to changing situations and that a security strategy includes “economic matters and energy, the environmental and fiscal policy”⁶³ in addition to the classical issues. The document does not define the concept of security. Instead, it refers to threats, such as terrorism, organised crime, energy and resource dependency, the proliferation of WMD, regional conflicts, failed states, etc. Those

⁶⁰ Ibid. p. 9.

⁶¹ Ibid p. 8, Oral evidence from the Prime Minister, Q36.

⁶² Germany's two political parties, the Christian Democratic Union of Germany (CDU), the Christian Social Union of Bavaria (CSU). The draft was suggested by both parties because of their political cooperation on many issues.

⁶³ A. Schockenhoff, 'A Security Strategy for Germany', *ISPSW*, Resolution of the CDU/CSU Parliamentary Group from May 6, 2008. (Presented at the CDU/CSU Security Conference Berlin, May 7, 2008) p. 2.

threats were covered in the US security strategy reports as well as the UK report, which implies the existence of common security interests. Similar to the British and American strategy reports, the German report shows concern on infrastructures of transport, energy and financial markets, since Germany has opened critical infrastructures market to foreign investment. The report suggests taking a comprehensive approach to security strategy, which can cover economic, energy and environmental policy as well as foreign and defence policies.

It also notes that “the goal must be to minimise security risks pre-emptively and be in a position to intervene quickly and effectively anywhere crises that may affect our security are coming to a head in conflict”.⁶⁴ Thus, the government can implement measures to lower the possibility for a risk to become a real threat or to deal with the risk although the risk in question has not been materialised nor certain, confirming the willingness for Germany to be alert towards potential threats to national security.

Similarly, France has outlined three priorities of its defence strategy: protection, deterrence and intervention.⁶⁵ The threats and risks specified in the French report include aggression by another state against the French territory, terrorist attacks, cyber-attacks, damages on scientific and technical potential, organised crime, major crises originating from natural, health, technological, industrial or accidental risks, and attacks on French nationals abroad.⁶⁶ The French government acknowledges that its policy direction is in coherence with most of the European Union’s priorities. Thus, it is crucial to consider the EU’s approach to security.

2.3. The European Union

The European Security Strategy (ESS) was adopted by the European Council in 2003. The ESS proposes the EU’s policy direction on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP). The ESS report, ‘A Secure Europe in a Better World’ 2003 specifies the EU’s security challenges and key threats as: terrorism, the proliferation of WMD, regional conflicts, failed states and organised crime. The report also addresses strategic objectives for the EU, including: specifying

⁶⁴ Ibid.

⁶⁵ France, ‘White Paper on Defence and National Security’, Ministry of Defence, 2013, p. 7.

⁶⁶ Ibid p. 47.

the threats, promoting effective multilateralism and building security in the neighbourhood (Balkans, Mediterranean, Southern Caucasus, and the Middle East).⁶⁷ In the Hague Programme 2004, the EU asserted that it would take a militaristic approach⁶⁸ in dealing with illegal immigration in the EU.⁶⁹ It also highlighted the role of preventive actions in order to minimise the possibility of conflicts, as part of anticipatory governance. The importance of international cooperation was also emphasised to tackle global threats.

In the 2008 Review of the ESS, cyber security, energy security, climate change and pandemics were added to the previous list of threats.⁷⁰ However, the 2008 Review was criticised in that it failed to take a strategic approach to security and to recommend clearer security aims and implementation tools to achieve security.⁷¹ The reason for such failure was attributable to the inclusion of the new Member States in the EU, which led to simply illustrating general principles of security rather than broadening the scope of common security policy.

The EU's CFSP contains an economic aspect of security since its measures are not limited to military means, but comprises an adequate combination of military, political and economic considerations. However, the EU's security policy does not specifically discuss economic security; rather it adopts the concepts of economic sanctions and "soft power"⁷² instruments, including withdrawing foreign financial assistance or initiating restrictions on trade. The 2014 Annual Report on the main aspects and basic choices of the CFSP highlights the EU's effort to utilise a wide range of tools to tackle new challenges and threats by contemplating a long-term strategy and taking into account emerging global changes. The report also emphasises the importance of taking

⁶⁷ European Parliament, 'Towards a New European Security Strategy? Assessing the Impact of Changes in the Global Security Environment', EU Directorate-General for External Policies Policy Department, June 2015, p. 7.

⁶⁸ Council of the European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', 13 December 2004.

⁶⁹ As the issue of illegal immigrants in the EU became more serious, scholars and think tanks have been also involved in a discussion on the issue. See further, the CHALLENGE Project, 'The Changing Landscape of European Liberty and Security', *CEPS Research Paper*, no.4, 2007 & *CEPS Research Paper*, no. 19, 2009.

⁷⁰ European Union, 'Report on the Implementation of the European Security Strategy', Brussels, 11 December 2008, S407/08, p. 8.

⁷¹ European Parliament, 2015, *supra* note 67, p. 8.

⁷² Instead of using coercion, implementing certain policies (stemming from an ability) which are considered as more legitimate and effective. See further J. S. Nye, *Soft Power: The Means to Success in World Politics*, New York: Public Affairs, 2004.

a comprehensive approach with a diversity of policy instruments, including humanitarian aid.⁷³ Similarly, the report “An Open and Security Europe: Making it Happen”, states that security policy should be directed with predicting new challenges, promoting the EU’s values and complying with international human rights obligations, especially to deal with migration.⁷⁴

The European Commission reinforced this direction in the European Agenda on Security 2015.⁷⁵ This report underlines the complementary relationship between security and fundamental rights, which include democratic values based on the Charter of Fundamental Rights.⁷⁶ The report further stresses security measures should conform to principles such as necessity, proportionality and legality with accountability and judicial redress through strict tests conducted by the Commission.⁷⁷ It is also argued that the internal security of the EU and the external security are mutually reliant, so the EU’s approach has to be comprehensive by taking both internal and external dimensions of security into consideration.

However, the main focus of the Agenda lies on military security and cybersecurity given that the Agenda prioritises combatting terrorism, organised crime and cybercrime.⁷⁸ It does not make any reference to the economic aspects of security such as economic measures against economic crises or non-Member States’ ownership over certain industries. This is understandable since the EU has tried to minimise economic regulations within the EU and each Member State retains the authority to implement measures appropriate and necessary against an economic crisis and to define certain sectors as critical infrastructure which foreign investors are not permitted to invest in or which foreign investors are subject to more restrictions and regulations to invest in. Thus, while the EU focuses on the due process of applying security measures by

⁷³ Council of European Union, ‘2014 Annual Report from the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament on the Main Aspects and Basis Choices of the CFSP’, Brussels, July 20, 2015, 11083/15, p. 16.

⁷⁴ European Commission, ‘An Open and Security Europe: Making it Happen’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, COM/2014/0154 final, March 2014.

⁷⁵ European Commission, ‘The European Agenda on Security’, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, COM/2015/0185 final, April 2015.

⁷⁶ Article 52(1) of the Charter of Fundamental Rights of the EU, 2000/C 364/01; Joined Cases C-293/12 and C-594/12, Judgment of the European Court of Justice of 8 April 2014.

⁷⁷ European Commission, 2015, *supra* note 75, p. 3.

⁷⁸ *Ibid* p. 2.

ensuring that such measures comply with aforementioned principles, including proportionality, Member States can implement policies and measures which are necessary for their countries' circumstance.

3. Foreign Investment Owned or Controlled by a Government in Investment Agreements

The OECD Working Paper entitled 'The Policy Landscape for International Investment by Government-controlled Investors' is an important document for considering a government's foreign investment. The Working Paper is concerned with states' policy in relation to foreign investment by foreign government-controlled investors (GCIs), such as state-owned enterprises (SOEs) or sovereign wealth funds (SWFs). The Working Paper highlights that reference to GCIs in IIAs has recently become frequent because the participation of GCIs has increased in the international investment market and also because little attention had been paid to GCIs until their active participation.⁷⁹ Most BITs do not make explicit reference to investors owned or controlled by a government. Additionally, they do not provide for different treatment, nor do countries apply separate policies on foreign investment, based on ownership structure, whether privately-owned or government-controlled. However, some countries have implemented policies which specifically apply to GCIs.

Less than 1% of the surveyed IIAs contain explicit reference to GCIs or SWFs.⁸⁰ Interestingly, BITs tend to define investors in general terms. For example, one BIT defines an investor as "a legal person or any entity [...] whether private or government-owned or controlled".⁸¹ Another BIT defines enterprises as "any entity [...] whether privately or governmentally owned".⁸² The OECD Working Paper defines a state-owned or state-controlled entity as "a department of government, corporation, institution or undertaking wholly or partially owned or controlled by government and engaged in activities of a commercial nature".⁸³ Thus, in defining investors, any legal

⁷⁹ Y. Shima, 'The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey', *OECD Working Papers on International Investment*, 2015/01, OECD, 2015, p. 11.

⁸⁰ Ibid p. 14.

⁸¹ The BIT between Austria and Georgia (2001).

⁸² The BIT between Mexico and India (2007).

⁸³ Shima, 2015, *supra* note 79, p. 14.

entity which is owned or controlled by a government includes not only an entity which is wholly controlled by government, but also partially controlled ones. Therefore, if a government has certain control over such an entity, it is regarded as a state-controlled or government-controlled investor.

Despite the infrequent explicit inclusion of SOEs in IIAs, the Working Paper notes that three Panama BITs expressly exclude SOEs of Panama within the category of enterprises. The BITs state that “companies mean all juridical persons constituted in accordance with the legislation in force in Panama [...] which have their domicile in the territory of the Republic of Panama excluding State-owned enterprises”.⁸⁴ However, the exclusion of SOEs is not applied to SOEs from its treaty partners – the UK, Germany and Switzerland.⁸⁵ Therefore, SOEs of the UK, Germany and Switzerland are recognised as enterprises, whilst Panama’s SOEs are not recognised as companies.⁸⁶ The Working Paper suggests that the recent trend shows that treaties have increasingly made explicit reference to GCIs, especially SOEs, in defining investor so that states which have a large size of SWFs can expect and ensure the protection coverage which extends to investors controlled or owned by governments.⁸⁷ Countries such as Kuwait, Qatar, United Arab Emirates (UAE) and Saudi Arabia have a great scale of GCIs and are willing to consider GCIs as investors, in order to be within the protection purview. Those types of foreign investment are only mentioned in IIAs of the countries where a government is either playing a direct and significant role as a GCI or engaged in foreign investment markets as a foreign investor. In the India-Saudi Arabia BIT, the effort to include GCIs as an investor is evident. Saudi Arabian investors include “the Government of Kingdom of Saudi Arabia and its financial institutions and authorities such as the Saudi Arabian Monetary Agency, public funds and other similar governmental institutions existing in Saudi Arabia”.⁸⁸ There is no such reference to the Indian government as an investor in the BIT. This shows the awareness of both Contracting Parties that Saudi Arabia has large SWFs,

⁸⁴ Article 1(d)(i) of the BIT between Panama and United Kingdom (1983).

⁸⁵ Shima, 2015, *supra* note 79, p. 13.

⁸⁶ Article 1(d)(ii) of the BIT between Panama and United Kingdom (1983) specifies that “in respect of the UK: corporations, firms and associations incorporated or constituted under the law in force in any part of the UK or in any territory to which this Agreement is extended in accordance with the provisions of Article 10.”

⁸⁷ Shima, 2015, *supra* note 79, p. 18.

⁸⁸ Article 1(2)(III) of the BIT between India-Saudi Arabia (2006).

one (SAMA Foreign Holdings) of which is ranked as the 5th largest globally. This made it imperative for Saudi Arabia to seek certain protection its GCI's status,⁸⁹ whereas India lacks such SWFs. Another example of such inclusion is the Kuwait-Mauritius BIT, wherein the term "investor" includes "the Government of each party itself", and "any legal person constituted or incorporated [...] whether privately or governmentally owned or controlled."⁹⁰ The inclusion would be for the same reason as Saudi Arabia, as Kuwait Investment Authority ranked the 4th largest SWF the world over.⁹¹ This illustrates that contracting parties would opt for a different meaning and scope for certain terms such as investors, depending on SWF ownership.

Norway's Government Pension Fund Global provides another example of a large scale SWFs. Norway's petroleum income produces the surplus for the Government Pension Fund Global.⁹² However, Norway's investment agreements in force do not make a particular reference to GCIs. This phenomenon may stem from Norway's partnership with the European Free Trade Association (EFTA).⁹³ BITs concluded as a member state of the EFTA does not represent the individual interest of Norway. Chapter 5 of "Investment of EFTA-Costa Rica-Panama FTA" defines an investor as "any legal entity duly constituted [...] whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association".⁹⁴ Contrariwise, the definition of investors in the Norwegian Model BIT 2015 explicitly includes "a Party."⁹⁵ The inclusion of a contracting party, that is, Norway, in the Model BIT, confirms Norway's attempt to accord its GCIs the status of investor.

Conversely, Australia, Costa Rica, Iceland, Israel, Mexico, Spain and Turkey have special restrictions on inward investment by GCIs. Australia, Iceland and Spain apply certain measures to all investment controlled by government. For example, Iceland

⁸⁹ Statista, 'Largest sovereign wealth funds worldwide as of December 2017', <http://www.statista.com/statistics/276617/sovereign-wealth-funds-worldwide-based-on-assets-under-management/> (accessed May 3, 2018).

⁹⁰ Article 2(c) of the BIT between Kuwait-Mauritius (2013).

⁹¹ Statista, *supra* note 89.

⁹² Ibid.

⁹³ Since the year of 1992, Norway has entered into investment and trade agreements as a member state of EFTA. The last independent investment agreement of Norway entered into force in 1998, with Russia.

⁹⁴ Article 5.2 (a) of the BIT between the EFTA, Costa Rica and Panama 2013, Chapter 5.

⁹⁵ Section 1, Article 2. Definitions of Norway Model BIT 2015.

explicitly prohibits “investment by foreign states or state-owned enterprises, unless an authorisation is granted.”⁹⁶ In contrast, countries such as Costa Rica, Israel, Mexico and Turkey impose sector-specific regulations on foreign GCIs. Costa Rica has such restrictions on mining or exploration of ores; Israel on cable broadcasting licences;⁹⁷ Mexico on communications or transport activities; and Turkey on the petroleum sector.⁹⁸ These restrictions pattern by states on certain industries shows states’ concern over their critical infrastructure sectors: communications, transports, and distribution of petroleum in addition to extractive industries directly relevant to energy security. Moreover, implementation of sector-specific regulations implies that countries face distinctive socio-economic circumstances and their priority regarding critical infrastructures also varies.

Australia, Canada, Russia and the US have regulations targeting investments by foreign GCIs, requiring such investments to undergo thorough regulatory scrutiny. This type of regulations is different from the aforementioned restrictions in that the regulations are not deterring GCIs’ investment or providing less favourable treatment – the cases of Australia, Canada and the US will be further discussed in the next section.

Regarding GCIs, countries have different attitudes towards foreign investments owned or controlled by government. Most IIAs are ownership-neutral without foreign investment policies aimed at foreign GCIs’ investment.⁹⁹ Thus, it remains debatable if investor status is only granted to foreign GCIs where the relevant BIT provides so, or GCIs are generally qualified as investors unless the BIT excludes them. Countries with large SWFs generally seek to pave the way for their SWFs to be accorded legitimate protection. Nonetheless, some countries have shown their concerns regarding GCIs by either restricting or prohibiting foreign GCIs from investing in certain critical industries through regulations.

⁹⁶ Shima, 2015, *supra* note 79, p. 9.

⁹⁷ Israel reported that a licence in cable broadcasting may not be granted to a foreign government investor, or even to an investor in which a foreign government has shares, unless an indirect holding in the licensee of up to 10% is authorised by the Minister of Communications.

⁹⁸ Shima, 2015, *supra* note 79, p. 8.

⁹⁹ *Ibid* p. 5.

4. National Security in Domestic Investment Law and Critical Infrastructure

This section explores the foreign investment policies that states implement when dealing with national security issues. It will also review the roles of critical infrastructures in the national policies of European and North American countries.

As mentioned in the previous section, national security and critical infrastructures are closely related. States have constantly shown concern over critical industries, and have expressed willingness to protect those industries by sometimes taking drastic measures. The ambition to protect critical industries has been more seriously ignited by foreign investors' bids to acquire national champion companies or industries which have public social concerns. Therefore, this section analyses each country's understanding of critical infrastructure and the implication of national security in investment policy, including an exception to restrict foreign investment or thorough appraisal of foreign investment.

4.1. European Countries

In general, the EU Member States tend to have a foreign investment-friendly policy. This section discusses the approaches in the United Kingdom, Germany and France, as representative examples of European Countries.

The United Kingdom

The UK implements an open economic policy to foreign investment and generally provides foreign investors with no less favourable treatment than domestic investors. Although there is no legislation for imposing restrictions only targeting foreign investments, there are some exceptions related to national security.¹⁰⁰ Specifically, the UK government retains the right to prevent particular mergers and acquisitions under a certain legal framework if the transactions are determined to be contrary to the national interests of the UK.

¹⁰⁰ A. M. Calvaresi-Barr, 'Laws and Policies Regulating Foreign Investment in 10 Countries', *Government Accountability Office Report*, 2008, p. 99.

First of all, as a member state of the EU, the UK is subject to EU law. The EC Merger Regulation which grants a government the authority to intervene in mergers and acquisitions provides in Article 21(4) that:

Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules¹⁰¹ shall be regarded as legitimate interests within the meaning of the first subparagraph.¹⁰²

As illustrated in the previous section, the scope of public security in the EU's security strategy reports is not sufficiently broad in order to include an economic concern as one of public security issues. This is particularly so since the recent report explicitly prioritises security concerns pertaining to terrorism and cybercrime given the contemporary global circumstance.¹⁰³ Nevertheless, the meaning of public security is not confined, as security concerns are likely to evolve depending on the period. In addition to the evolutionary feature of security, the scope of security can be adjusted because the authority to interpret security belongs to each Member State as long as the concept is compatible with EC law.

Powers similar to those in EC law can be found in the UK *Enterprise Act 2002*. The *Enterprise Act* enables the UK government to intervene in a merger or acquisition of British companies by foreign entities if the transaction is deemed to be against the public interest of the UK.¹⁰⁴ The Secretary of State for the Department of Business, Enterprise and Regulatory Reform (DBERR) has the authority to determine if a transaction is contrary to the UK public interests. Essentially, the *Enterprise Act 2002* significantly reformed UK mergers and acquisitions regulations. Before the *Enterprise*

¹⁰¹ Prudential rules for financial services such as in the banking and insurance sectors; see Slaughter and May, 'The EU Merger Regulation: an Overview of the European Merger Control Rules', *Slaughter and May*, January 2018, p. 18.

¹⁰² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

¹⁰³ See further Chapter 3.2.3. The European Union.

¹⁰⁴ Section 42(2) of the UK Enterprise Act 2002.

Act, a competition test was considered primary because intervention by the Secretary of State for the DBERR was initially intended to counter anti-competitive mergers, which means that domestic investors are also subject to such an intervention. The *Enterprise Act* substituted the *Fair Trading Act 1973* which was criticised for its vague scope of public interest test.¹⁰⁵ For example, the considerations of public interest test specified in section 84 of the *Fair Trading Act 1973* include effective competition between service providers, interests of consumers and balanced distribution which are ambiguous. The term public interests suggested in the section did not explain what types of public interests would be considered. Instead, it noted promoting competition rules and provided an insufficient explanation of public interests.

On the contrary, section 58 of the *Enterprise Act* specifies the scope of transactions subject to a public interest test as an investment which has considerations of national security and financial stability.¹⁰⁶ The section further specifies that there may be an intervention in a merger or acquisition of investment in relation to plurality of the media, which is consistent with section 319 of the *Communication Act 2003*. If a merger is involved in the fields above, the Secretary of State can assess if the merger is contrary to public interests while the competition test is in process. In addition to the right to intervene for the specified considerations, the Secretary of State is entitled to modify the section such as adding a new proposal or amending any considerations specified in the section. As the right to adjust the scope of national security belongs to the Secretary of State, there is always room for further development on the consideration list. The *Enterprise Act* further stipulates that the Secretary of State has the right to intervene in takeovers if the firm in the acquisition possesses information “relating to defence and of a confidential nature” which shows a more traditional approach to security.¹⁰⁷

Additionally, section 58 of the *Enterprise Act* expressly provides that the interests of national security include public security which has the same meaning with public security in article 21(4) of the EC Merger Regulation. The provision that the interests

¹⁰⁵ A. Seely, ‘Mergers and Takeovers: The Public Interest Test,’ Briefing Paper, Number 05374, September 1 2016, *House of Commons Library*.

¹⁰⁶ Financial stability is included in the amendment of the list of public interest considerations by the Labour Government in October 2008, which added “the interest of maintaining the stability of the UK financial system” to section 58 of the 2002 Act.

¹⁰⁷ Section 58 of the UK Enterprise Act 2002.

of national security include public security implies that public security and national security do not share the same meaning.¹⁰⁸ Rather, the meaning of national security takes into consideration the concept of public security by the EU and, in addition to it, UK's specific understanding of national security which has room for further development.

However, within the UK, there has been a constant controversy over the balance of tests. Whereas the meaning of public interest is too broad and vague, focusing on a competition test can lead to increasing clarity of the merger framework and predictability. There will be a reduction in certainty when more factors are taken into account in the mergers process.¹⁰⁹ Many politicians are sceptical when it comes to a wider public interest test because a domestic political pressure can negatively affect transparency and predictability in the process of a public interest test, which leads to arbitrary decisions rather than fair and justifiable ones.¹¹⁰ The government has however stated that it does not have current plans to amend the *Enterprise Act* on public interest grounds since it is believed that the existing framework covers the scope sufficiently to take actions against mergers for the protection of national interests.¹¹¹

The former Secretary of State, Peter Lilley, stated that the UK had pursued the optimal allocation of resources in the market for the interests of industries and consumers, by implementing privatisation and liberalisation of the market.¹¹² However, he noted that government-controlled companies should be treated differently since they are less likely to compete fairly with private companies and their decision may be made for non-commercial purposes giving rise to market-distorting impacts. Therefore, he argued that the Monopolies & Mergers Commission (MMC) must be given the right to review mergers involving such companies. Yet, referring a case to the MMC does not necessarily mean that it is expected to be against public interest.¹¹³ In response to

¹⁰⁸ See further Chapter 2.2.2. Public Order (in relation to public security).

¹⁰⁹ Standing Committee B, 25 April 2002, cc 293-4.

¹¹⁰ UK Department for Business, Innovation and Skills, 'Oral Evidence given by Rt Hon Lord Mandelson, Pat McFadden MP, 19 January 2010, HC 299-I, Q13.

¹¹¹ UK, 'Government Response to the Business Innovation and Skills Committee's Report on "Mergers, Acquisitions and Takeovers: The Takeover of Cadbury by Kraft"', CM 7915, July 2010, pp. 5-6.

¹¹² Seely, 2016, *supra* note 105, pp. 6-8.

¹¹³ UK, 'Written Answers on Postal Orders', HC Deb 26 July 1990, series 6, vol. 177, cc 415-6W. The statement was reproduced in, Department for Trade and Industry press notice 90/457, 'Merger Reference Policy', July 26 1990.

Mr Lilley's concern, the Trade and Industry Committee contemplated certain restrictions of foreign government-controlled bidders, referred to as state-controlled bidders.¹¹⁴

Increased monitoring of state-controlled bidders might be justified since GCIs may be capable of dominating the market irrespective of their commercial performance due to an unclear financing source and may involve political considerations on decision-making. Yet, simultaneously, it is important not to presume that state control of the acquirer would be contrary to competition and the public interest. Therefore, the Secretary of State should not intervene if the degree of state control, size of the entity, the share of the market, the likelihood of exercising market influence, and evidence of anticompetitive action are insignificant.¹¹⁵

The government's desire to intervene in the market at a minimum can be grasped in relation to the *Industry Act 1975*. The *Industry Act 1975* empowers the government to intervene in foreign takeovers of important manufacturing sectors when such a change of control of the sector is contrary to UK interests. However, this clause has never been invoked by the government. The reason may be that manufacturing sectors are generally regarded as non-critical infrastructure considering their level of importance in society although it can become one of the targeted industries if a state plans to enhance the profitability of the industry. Thus, the importance of manufacturing sectors in society has decreased compared to research and development or high technology sectors. Although the UK applies golden shares in certain strategic areas including BAE Systems and Rolls-Royce¹¹⁶ on national security grounds,¹¹⁷ the fact that the UK government did not invoke the *Industry Act*¹¹⁸ shows its attempt to minimise the room for governmental manoeuvre in foreign takeovers.¹¹⁹

Unlike the US's case with Dubai Ports World, despite the risk to national security, the UK decided not to intervene in the takeover of the ports and shipping group, P&O by Dubai Ports World which is a GCI. Hence, all of the UK's ports are owned by Dubai

¹¹⁴ UK, 'First Report: Takeovers and Mergers', HC 90 1991-92, November 27, 1991, pp. liv-lv.

¹¹⁵ Ibid para 238.

¹¹⁶ Foreign ownership of voting stocks in BAE Systems and Rolls-Royce is limited to 15 percent.

¹¹⁷ Calvaresi-Barr, 2008, *supra* note 100, p. 101.

¹¹⁸ The ECJ ruled that application of gold shares is only acceptable under specific circumstances and strict conditions.

¹¹⁹ Calvaresi-Barr, 2008, *supra* note 100, p. 102.

Ports World. However, as demonstrated in the previous chapter, foreign ownership of energy sectors¹²⁰ – and by extension foreign ownership of other critical infrastructures – has drawn keen attention. Moreover, in relation to national security and interests, the definition of critical infrastructure plays an important role in predicting amendment in the scope of section 58 of the *Enterprise Act*. The UK defines critical infrastructures as “certain critical elements of infrastructure, the loss or compromise of which would have a major, detrimental impact on the availability or integrity of essential services, leading to severe economic or social consequences or to loss of life”,¹²¹ including energy supply pipelines, transport, water supplies, most of which are run by private enterprises in the UK. This signifies that the UK is aware of the potential catastrophic impact where critical infrastructures are not fully functioning.

The UK’s crucial interest in its critical infrastructure can also be noticed in the document ‘Foreign involvement in the Critical National Infrastructure (CNI): the Implications for National Security’ submitted by the UK Intelligence and Security Committee.¹²² The document mainly discusses the potential impact of foreign involvement – Huawei, the Chinese GCI – in the telecommunication industry. The document doubts if there is any ties between the company and the Chinese government, which will be a security risk. While the Committee contemplates the risks in the telecommunication infrastructure, it noted that the same concern is applicable to other CNIs. Since many shareholders of companies are located abroad, this directly raises concern over national security issues.¹²³ It also highlighted that the risk to CNIs inevitably exists, due to the global supply chains. Notwithstanding, the government is urged to manage CNIs by enhancing an examining process, developing strategies for managing risks, calculating the potential impact on CNIs, assessing risks, and clarifying the authority for responsibility and accountability.¹²⁴ In response to the Committee’s document, the UK government decided to adopt a risk-based approach as more appropriate, stating that a risk on CNIs is not a corollary of foreign ownership

¹²⁰ The UK Prime Minister expressed his concern over the UK’s energy dependency. See further Chapter 3.2.2. European Countries.

¹²¹ Centre for the Protection of National Infrastructure, ‘Critical National Infrastructure’, www.cpni.gov.uk/about/cni (accessed January 22, 2013).

¹²² UK Intelligence and Security Committee, ‘Foreign Involvement in the Critical National Infrastructure: The Implications for National Security’, June 2013.

¹²³ Ibid p. 19.

¹²⁴ Ibid.

and foreign investment in CNL. Hence, the government concluded to deal with the issue on a case-by-case basis.¹²⁵

The UK example of dealing with foreign investment involving critical industries demonstrates the government's awareness the risks involved in foreign investment in such industries. Simultaneously, the discussion highlights that there should not be unnecessary restrictions which prevent attraction of foreign investments into the UK. Accordingly, the UK has to pursue a more balanced approach, which is evidenced by the non-blockage of foreign investment in the relevant industries. Furthermore, despite controversy regarding expanding the scope of public interest and national security, the current situation shows that the UK is not willing to impose any restrictions on foreign investment, in order to remain an open investment market. However, if the UK government is concerned about the impacts of foreign ownership on the energy sector, there might be further restrictions or perhaps broadening of the *Enterprise Act* as possible policy options designed to enhance the security of the country.

Germany

Similarly, Germany is also one of the least restrictive countries regarding foreign investment. Germany did not enact any particular restrictions or prohibit foreign investment apart from general restrictions under competition law and certain requirements for investing in finance sectors, which are equally applied to domestic and EU investors.¹²⁶ Germany, however, enacted new legislation in 2004 that foreign investors have to notify the German Federal Ministry for Economic Affairs and Energy of a business acquisition involved with manufacturing armaments or cryptosystems. This legislation empowers the German government to restrict or prohibit acquisition of certain industries if the acquisition is deemed to affect security interests of Germany significantly.

In 2008, the OECD published a document regarding SWFs which recognises the necessity of implementing investment measures in order to address national security

¹²⁵ UK, 'Government Response to the Intelligence and Security Committee's Report of Session 2013-14: Foreign Involvement in the Critical National Infrastructure, July 2013, pp. 5-6.

¹²⁶ Norton Rose Fulbright, 'Restrictions on M&A Transactions under German Foreign Investment Law - A Brief Guide', October 26, 2011, <http://www.nortonrosefulbright.com/news/57747/restrictions-on-ma-transactions-under-german-foreign-investment-law-a-brief-guide> (accessed January 22, 2013).

concerns.¹²⁷ In response to increasing concerns regarding the relationship between national security and foreign investment, the German government amended *the German Foreign Investment Act* in 2009, to restrict or prohibit acquisitions by foreign investors from outside the EU and the EFTA (Liechtenstein, Iceland, Norway and Switzerland) if the acquisition is considered to jeopardise “the public order or security” and to pose “an actual and sufficiently serious threat that affects a fundamental interest of the society”. The new 2009 legislation does not confine sectors to armaments or cryptosystem industries like the 2004 legislation. This granted the government the right to examine a wide range of acquisitions regardless of the types of sectors and the prerogative to adapt the list of the sectors to changes. For example, new types of industries could be regarded as essential depending on the economic situation of the country. With the approval of the Federal government, the Federal Ministry for Economic Affairs and Energy may prohibit or restrict the acquisition for public order or security reasons if it involves acquiring at least a 25% stake of a German company by a non-EU/EFTA company, while foreign investors who own minor shares are not subject to such legislation. This standard shows that the concern lies with operational control rather than ownership. Foreign investors may apply for a clearance certificate which is a binding statement by the Ministry of Economic Affairs and Energy that the transaction is not deemed as a threat to public order or security by providing information on the planned transaction. Thus, if it is concluded that there are no concerns over public order or security, the ministry must give the clearance certificate.

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Till date, the German government has not invoked the clause to impose any restrictions or prohibit acquisitions. Yet, as far as foreign ownership of certain industries is concerned, the government’s attitude can be evolving contingent on domestic and global situations. Although the new legislation specifies that the restriction is applied regardless of types of sectors, as shown in the policy suggestion in the previous section,¹²⁹ Germany has a keen interest in its critical infrastructures such as energy,

¹²⁷ The OECD document on Sovereign Wealth Funds and Recipient Country Policies discusses the procedures for applying the concept of national security in policy related to SWFs and raises questions as to necessity of new rules governing SWFs.

¹²⁸ Freshfields Bruckhaus Deringer, ‘Foreign Investment Germany – Extended Client Briefing’, July 24, 2017, http://knowledge.freshfields.com/en/Global/r/3558/foreign_investment_germany_-_extended_client_briefing (accessed May 3, 2018).

¹²⁹ See Chapter 3.2.2. European Countries.

financial markets and transport. Remarkably, Germany has pursued a liberal policy to foreign investment regarding critical infrastructures. In Germany, critical infrastructures are defined as “organisations and facilities of major importance to the community whose failure or impairment would cause a sustained shortage of supplies, significant disruptions to public order or other dramatic consequences.”¹³⁰ This definition seems to incorporate the meaning of public order within the scope of critical infrastructures. As discussed in Chapter 2, public order in Germany is commonly used with public security, and it is found that there is a certain overlap between essential security interests and public order to the extent that they aim at the protection of national interests in society.¹³¹ In relation to public security and public order, Germany acts more pre-emptively and effectively as discussed in the policy suggestion.¹³² Therefore, German foreign investment policy concerning critical infrastructures can be more stringent than other sectors in the future although after introducing the new *German Foreign Investment Act 2009*, it was noted that such legislation is only applicable in the exceptional cases and the government remains very open with foreign investments.¹³³

France

The French government introduced a new decree 2014-479 which entered into force as of 14 May 2014 to expand the list of strategic sectors i.e. critical industries, which requires foreign investors to receive authorisation from the French Minister of the Economy before investing in France, complying with article L.151-3 of the French Monetary and Financial Code. The prior authorisation is required only if foreign investment is involved in “activities relating to equipment, products or services including those relating to the safety and the proper functioning of facilities and equipment, essential to guarantee the French national interests regarding public policy, public security or national defence”.¹³⁴ In other words, to be granted the authorisation,

¹³⁰ Germany, ‘Public-Private Partnership for Critical Infrastructure Protection’, *UP KRITIS*, February 2014, p. 4.

¹³¹ See further Chapter 2.2.2. Public Order.

¹³² Germany, ‘A Security Strategy for Germany, Resolution of the CDU/CSU Parliamentary Group’ May 6, 2008 (Presented at the CDU/CSU Security Conference Berlin, May 7, 2008), p. 2.

¹³³ Pöllath + Partners, ‘Foreign Investments in Germany: Legal and Tax Aspects of M&A and Real Estate Transactions’, 2013, pp. 58-59.

¹³⁴ Latham and Watkins, ‘New French Regulations Tighten Control on Foreign Investments’, *Client Alert Commentary*, no. 1688, May 16, 2014, p. 1.

foreign investors should ensure that the transaction will not affect *order public* (public policy or public order), public safety or national. The new sectors included in the list are telecommunications, energy, transport, public health and water¹³⁵ as well as facility or structure of vital importance pursuant to articles L.1332-1 and L.1332-2 of the Defence Code, while the previous sectors subject to the authorisation, such as national defence and information technology, remain valid.¹³⁶

Although expanding the scope of foreign investment restrictions can cause an opposition from the EU insofar as it creates a “restriction of capital movements between Member States and between Member States and other countries” as specified in Article 56 of the EC Treaty, the exceptions, specified in Article 58 of the EC Treaty, may permit such restrictions for “reasons of public interest or public safety” if they are in conformity with proportionality. Thus, by inserting the phrase “for the protection of the public order or public safety” in the decree, the French government seems to hope to achieve the coherence between the national decree and the EC law. This could be because the ECJ case law requires Member States to take measures which restrict the free movement of capital within the EU only for the sake of public order or public safety.¹³⁷ Therefore, France seeks to strike a fair balance between expanding the scope of the restrictions applying to foreign investors for national interests and complying with EU legislation, as an EU member state.

There are three types of foreign investment which are subject to prior authorisation in France. These types are as follows:

A transaction as a result of which a non-EU investor (i) acquires the control (within the meaning of art. L. 233-3 of the commercial code) or (ii) acquires all or part of a business (*branche d'activité*) or, (iii) crosses the threshold of 33.33 percent of the share capital, of a company whose registered office is located in France.

¹³⁵ Ibid.

¹³⁶ Article L.1332-1 states that “[...] public or private operators which exploit some installations or use installations or facilities whose unavailability would seriously compromise the warfare or economic capabilities, the security or survivability of the nation, have to cooperate at their own expense [...] in order to protect these installations, structures or facilities against any threat, particularly terrorism. These installations, structures or facilities are designated by the administrative authority.”

¹³⁷ Case C-54/99, *Eglise de Scientologie v. France* [2000] ECR I-01335.

A transaction as a result of which an EU investor (i) acquires the control (within the meaning of art. L. 233-3 of the commercial code) or (ii) acquires all or part of a business of a company whose registered office is located in France.

A transaction as a result of which a French investor under foreign control acquires all or part of a business of a company whose registered office is located in France.

From the above, the scope of foreign investment, which is required for prior authorisation, was broadened by including EU investors and French investors under foreign control in the investment list. The increasing interest in foreign control of domestic industries can explain the broadened scope of foreign investment subject to prior authorisation.

Furthermore, the scope of industries subject to review varies depending on the nationalities of investors, more particularly, EU/EFTA investors, French investors and non-EU investors. The definition of strategic business sectors is narrower and more stringent for EU investors and French investors than for non-EU investors. Mostly, the definition is restricted to military and national security considerations. For example, a transaction by EU investors and French investors will be restricted when the business “provides private security services to public or private-sector entities in critical facilities or infrastructures, the unavailability of which could materially jeopardize France’s military or economic potential,¹³⁸ provides airport and harbour security services,¹³⁹ or involves classified information.¹⁴⁰” For non-EU investors, a transaction will be restricted if it provides any private security services.¹⁴¹ Nevertheless, when it comes to the extra sensitive sectors, the French government applies the same sector definition to both EU and non-EU investors. The extra sensitive sectors are industries involved in cryptology,¹⁴² classified information,¹⁴³ research and development and sale of any explosive substances which can be used by the military during a war.¹⁴⁴

¹³⁸ Article L. 1332-1 of the Defence Code.

¹³⁹ Article L. 282-8 of the Civil Aviation Code and Article L. 324-5 of Maritime Ports Code.

¹⁴⁰ Article L. 1332-1 of the Defence Code.

¹⁴¹ Article R. 153-1 of the Regulatory part of the RCMF.

¹⁴² Paragraphs III and IV of Article 30 and paragraph I of Article 31 of Law No 2004-575 of June 21, 2004 for confidence in the digital economy, JORF of June 22, 2004.

¹⁴³ Within the meaning of Decree No. 98-608 of July 17, 1998 relating to the protection of classified information.

¹⁴⁴ Within the meaning of Titles III and IV of Book III of the second part of the Defence Code.

Therefore, on the one hand, the strict restriction is imposed on the sectors closely linked to military security, which is the traditional concept of national security. On the other, sectors which have newly emerging security considerations, such as critical facilities or infrastructures, loss of which will have a serious impact on society, could be open to foreign investors, depending on their nationality.

The new legislation broadened the scope of national security in foreign investment policy, including industries which have appeared as critical infrastructures in many security strategy reports. Interestingly, France has not provided any legal framework or policy which defines critical infrastructure specifically or protects critical infrastructure.¹⁴⁵

In addition to blocking ENEL's takeover of Suez, an energy sector, as shown earlier, the broadening of security is also evidenced in the French government's intervention in General Electric (GE)'s takeover bid for Alstom's power generation and transmission assets,¹⁴⁶ due to concern regarding risks posed by a foreign takeover of domestic critical company.¹⁴⁷ Despite this, GE was given the approval to acquire Alstom's energy assets on the condition that Alstom's heavy duty gas turbines business be divested to Ansaldo of Italy since GE and Alstom were both main players in the heavy-duty gas turbine market. Hence, without the divestment, it would have resulted in higher price and less innovation.¹⁴⁸ This shows that such intervention takes into account the similar concern as the UK government contemplates, which is the balance between fair competition in the market and national security considerations. Thus, the broadening has achieved to some extent coherence between the interventions of takeover bids and investment policy in terms of critical infrastructures.

On a final note, traditionally, all the EU Member States restrict foreign investment in certain industries related to war or cryptosystems. Regarding restriction of foreign investments on the basis of national security, the UK has a more liberalised policy,

¹⁴⁵ BSA, 'EU Cybersecurity Dashboard: A Path to a Secure European Cyberspace', Country Report: France', 2015, <http://cybersecurity.bsa.org/index.html> (accessed May 3, 2018).

¹⁴⁶ The concern regarding foreign takeovers of domestic companies increased after a U.S. drug maker company, Pfizer's attempted to acquire rival AstraZeneca.

¹⁴⁷ J. Vey and B. Mallet, 'France Boosts Say on GE Bid for Alstom with Takeover Law', *Reuters*, May 15, 2014, <http://www.reuters.com/article/2014/05/15/us-france-takeovers-idUSBREA4D0WG20140515#Gjv06gtwYDYWVRg.99> (accessed May 3, 2018).

¹⁴⁸ European Commission, 'Mergers: Commission Clears GE's Acquisition of Alstom's Power Generation and Transmission Assets, Subject to Conditions', Strasbourg, September 8, 2015.

while France has taken a relatively restrictive approach by requiring prior authorisation for investments in critical infrastructures. The UK is also more lenient on foreign takeovers of industries which have security considerations, like Dubai Ports World's takeover of ports business in the UK. France is rather more concerned about such industries given its prohibition of an Italian company's takeover of a gas company in France. This difference implies that a country's attitude to economic policy – whether more liberalised or restrictive – can affect the gravity of national security in its foreign investment policy in relation to critical infrastructures.

4.2. North America

Canada

Canada, as mentioned in the previous section, has a review system on foreign investments. The main legislation governing foreign investment is *Investment Canada Act* (ICA), part of which stipulates the mechanism of reviewing process of takeovers of Canadian firms and establishment of a new business in Canada by foreign investors. The ICA was enacted in June 1985, replacing the *Foreign Investment Review Act* (FIRA) which came into force in 1973. The introduction of the ICA implicitly aimed at promoting more foreign investment because before the ICA, any foreign takeover of a Canadian firm was subject to review – governmental approval – regardless of the size of the firm and the amount of assets. Also, to acquire a business in Canada, foreign investors had to show that the investment would bring about “significant” benefit to Canada, the meaning and the scope of which were not clear.¹⁴⁹ Section 2 of the ICA clarified and amended “the benefit to Canada” test, as follows:

To provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employments opportunities in Canada and to provide for the review of investments [...] could be injurious to national security.

Thus, a foreign investment which is reviewable under the ICA is only approved if the Minister of Industry concludes that the investment is likely to be of “net benefit” to

¹⁴⁹ M. Frigon, ‘Background Paper: The Foreign Investment Review Process in Canada’, Publication No.2011-42E, July 12, 2011 (revised July 21, 2014), p. 5.

Canada. This does not mean every foreign investment is subject to such a review. Rather, depending on the monetary thresholds, there are two types of foreign investment; one subject to a notification, the other subject to review by providing information.

On 24 April 2015, Canada adopted new regulations which affect foreign investors regardless of the sectors as an amendment of the ICA. Canada began to implement policy which favours foreign investment by adjusting the policy in review.¹⁵⁰ A foreign investment which is reviewable includes SOEs and non-SOEs with at least CA\$600 million and foreign investment which the Canadian government considers to be possibly injurious to national security. Regarding applicable thresholds for review, the 2015 amendment introduced a new asset threshold for reviews, CA\$600 million (in enterprise value), which is expected to result in fewer foreign investment subject to reviews.¹⁵¹ However, the change does not apply to foreign SOEs which continue to be subject to the existing standard.¹⁵² Under the ICA, SOEs include entities owned by a foreign state and entities directly or indirectly owned, controlled or influenced by a foreign government. The factors taken into consideration during the process are if SOEs will have a net benefit to Canada and if the companies will have a purely commercial function.

The ICA also has national security provisions. Part IV.1 of the ICA grants the Canadian government the authority to review foreign investment which could be injurious to Canada's national security. Thus, it empowers the Federal Cabinet to impose any restrictions or measures if considered necessary or advisable to protect national security. If the Minister believes that investment by a non-Canadian could be injurious to national security, the Minister can send a notice to the foreign investor for the review of the investment.¹⁵³ Then the Minister requires the foreign investor to provide prescribed information which is considered necessary by the Minister in order

¹⁵⁰ C. Pawluch and K. Wright, 'Canada Adopts Significant Changes to Foreign Investment Review Framework', *DLA Piper*, September 23, 2015, p. 1.

¹⁵¹ The net benefit review threshold changed from the book value which focuses on assets of the company to the enterprise value which calculates market value of the company.

¹⁵² The assets of foreign SOEs are calculated in book value, not enterprise value, which increases the possibility of receiving government scrutiny. Investors from non-WTO member countries and foreign investment in Canadian "cultural business", which is connected to the Canadian Heritage and culture, continue to be subject to the existing net benefit review threshold (book value).

¹⁵³ Part IV.1 Article 25.2(1) of the ICA.

to determine if there are any reasonable grounds for the Minister to believe that foreign investment could be injurious to national security. The ICA prescribes the procedures of the review process and time periods, but it does not define national security, which leads to increasing uncertainty in the review process nor specify what kind of sectors will be subject to national security reviews. This means that all sectors can be subject to review. The ICA has been criticised for giving too much discretion to the Minister, thereby increasing unpredictability in the Canadian investment market.¹⁵⁴ Also, there are no monetary thresholds for national security reviews, in other words, even if the asset of the company is less than CA\$600 million which is only subject to a notification, it may be subjected to a national security review. In addition, if the government has reasonable grounds to believe that a foreign investment could be injurious to national security, the government may prohibit the investment, impose undertakings and conditions for the investment, or require its divestment, where the investment has been made. This makes uncertain the period of national security review, which is the strongest policy option for the government towards foreign investment.

The Accelero Capital Holdings' case demonstrated the Canadian government's power to prohibit foreign investment on the national security grounds. Accelero Capital Holdings, the Egyptian telecom magnate's investment firm, announced its bid to acquire Allstream division of Manitoba Telecom Services (MTS) Inc. for a transaction value of \$520 million. The Canadian government restrained the acquisition for national security reason under the ICA in October 2013, which was the first time that acquisition was rejected for national security under the ICA.¹⁵⁵ After the national security review, James Moore, the former Minister of Industry, said in a statement, "MTS Allstream operates a national fibre optic network that provides critical telecommunications services to businesses and governments, including the Government of Canada."¹⁵⁶ Although there is no reference to special regulations treating critical infrastructure in the ICA, by his statement, it seems that Canada acknowledges the necessity of paying close attention to critical infrastructures, which

¹⁵⁴ Frigon, 2011, *supra* note 149, p. 10.

¹⁵⁵ Ibid.

¹⁵⁶ C. Dobby, 'Ottawa Rejects Manitoba Telecom's Sale of Allstream, Citing National Security', *Financial Post*, October 7, 2013, <http://business.financialpost.com/technology/ottawa-rejects-manitoba-telecoms-sale-of-allstream> (accessed May 3, 2018).

raise security considerations. Critical infrastructures in Canada refer to “processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government....Disruptions of critical infrastructure could result in catastrophic loss of life, adverse economic effects, and significant harm to public confidence.”¹⁵⁷ The inclusion of security in the definition shows that Canada recognises the connection between critical infrastructures and national security. Conversely, the list of hazards and threats focuses on natural hazards, intentional threats, and technical hazards, while it does not address any economic concerns such as an economic crisis or SOEs.¹⁵⁸ Ordinarily, SOEs per se should not be treated as threats, but they may contain a possibility of risk to national security, which needs a national security review. Additionally, it is illustrated that the list is not exhaustive and it is expected to evolve.¹⁵⁹ The 2009 amendment to the ICA eliminated sector-specific restrictions imposed on investment in critical industries, such as transportation, financial services and uranium sectors. This led to lessening the restrictions and making the market more foreign investment-friendly. However, it is argued that a national security review can be used as a policy option for the Minister to review investment in a uranium business.¹⁶⁰ This means that, although Canada’s investment legislation has no specific provisions aimed at protecting critical infrastructures, the significance of critical infrastructures is still high. Accordingly, acquisition and establishment of such industries can be easily under tight scrutiny by the Canadian government on the ground of national security.

United States

In the US, critical infrastructures are defined as systems and assets, whether physical or virtual, so vital to the US that “the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”¹⁶¹ The critical

¹⁵⁷ Canada, ‘National Strategy for Critical Infrastructure’, November 10, 2011, p. 2.

¹⁵⁸ Public Safety Canada, ‘Risk Management Guide for Critical Infrastructure Sectors’, Annex B: List of Hazards and Threats, July 1, 2010, pp. 36-7.

¹⁵⁹ Ibid.

¹⁶⁰ H. Gordon and R. O. Hansen, ‘Doing Business in Canada 2013’, *McCarthy Tetrault*, April 8, 2013, p. 19.

¹⁶¹ US Department of Homeland Security, ‘National Infrastructure Protection Plan 2013: Partnering for Critical Infrastructure Security and Resilience’, 2013, p. 29.

sectors include telecommunications, energy, financial services, water, transportation,¹⁶² and “cyber and physical infrastructure services critical to maintaining the national defence, continuity of government, economic prosperity, and quality of life in the United States.”¹⁶³ The *Homeland Security Act of 2002* included the term “key resources” within the scope of critical infrastructures. Key resources are “publicly or privately controlled resources essential to the minimal operations of the economy and government.”¹⁶⁴ The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets, submitted by former President Bush in 2003, lists 11 sectors of critical infrastructure: agriculture and food, water, public health, emergency services, defence industrial bases, telecommunications, energy, transportation, banking and finance, chemical industry and hazardous materials, postal services and shipping,¹⁶⁵ which has a wide coverage.

However, *Foreign Investment and National Security Act 2007* which provides policy pertinent to foreign investment defines critical infrastructure as: those systems and assets, whether physical or virtual, so vital to the US that the incapacity or destruction of such systems and assets would have a debilitating impact “on national security.”¹⁶⁶ The difference of the definitions of critical infrastructures between the critical infrastructure plan and the investment policy is the absence of “national economic security, national public health or safety or any combination of those matters”. This alludes to the attitude of the US towards foreign investment. With such exclusion, the country may attempt to demonstrate its objective to be less restrictive with regard to foreign investment and to pursue an open economic system. Nevertheless, the horizon of national security is not confined, which is not atypical. This retains a possibility for national security to embrace national economic security concerns depending on the national circumstances.

US Congress passed the Exon-Florio provision of the *Defense Production Act* in 1988, which grants the President the authority to obstruct foreign mergers, acquisitions or

¹⁶² 42 U.S.C. §5195c(b)(2).

¹⁶³ 42 U.S.C. §5195c(b)(3).

¹⁶⁴ 6 U.S.C. §101(9).

¹⁶⁵ US Department of Homeland Security, ‘The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets’, February 2003, the White House Washington, p. 35.

¹⁶⁶ OECD, ‘Protection of Critical Infrastructure and the Role of Investment Policies Relating to National Security’, *OECD*, May 2008.

takeovers on the ground of national security if the President has “credible evidence” that the foreign investment will impair national security and if the President concluded that other US laws are inadequate to protect the national security.¹⁶⁷ Under the Exon-Florio, the Committee on Foreign Investment in the US (CFIUS) was established to monitor the impact of foreign investment in the US and to consider policy proposals on foreign investment.¹⁶⁸ The initial Exon-Florio received the criticism that the scope of foreign investment is broad, which decreases economic efficiency.

Therefore, in 1992, the Exon-Florio provision was amended, known as the Byrd amendment, which requires CFIUS to examine proposed takeovers only if:

- (1) the acquirer is controlled by or acting on behalf of a foreign government;
- (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.¹⁶⁹

The first requirement was fulfilled in the Dubai Ports World case, while the second was not met given that the CFIUS concluded, during the investigation, that the acquisition “did not affect the national security.”¹⁷⁰ *Foreign Investment and National Security Act of 2007* (FINSa) was adopted after the Dubai Ports World event. FINSa broadened the meaning of national security by including critical infrastructure in it, as specified in the *2001 USA Patriot Act*.

FINSa could require CFIUS to investigate all foreign investment deals if the entity is owned or controlled by a foreign entity. This resulted in imposing a burden of proof on foreign firms that their location of investment does not cause any security risk.

A similar approach was taken by Australia. Under the *Foreign Acquisitions and Takeovers Act 1975*, the Australian government can determine if the application of foreign investment is contrary to national interests of Australia. Foreign governments must be granted prior approval or permission before locating direct investment regardless of size of investment. However, private foreign investors generally do not need to obtain approval unless the size of their investment exceeds certain thresholds.

¹⁶⁷ P.L. 100-418, Title V, Section 5021, August 23, 1988; 50 USC Appendix Section 2170.

¹⁶⁸ J. K. Jackson, ‘The Committee on Foreign Investment in the United States (CFIUS)’, *Congressional Research Service*, March 13, 2018, p. 2.

¹⁶⁹ P.L. 102-484, October 23, 1992.

¹⁷⁰ US, ‘Briefing on the Dubai Ports World Deal before the Senate Armed Services Committee’, Senate Hearing 109-782, February 23, 2006.

The meaning of “contrary to national interests” can be very wide and cannot be defined by a hard and fast rule. Hence, it will be decided on a case-by-case basis,¹⁷¹ by taking into consideration national security or impact on national economy or society.¹⁷² The rules can also vary depending on the size of the target enterprise, the technological assets, or the sensitivity of the sector.¹⁷³ To decrease arbitrary actions against GCIs and increase transparency, the government produced the Guidelines for Foreign Government Investment Proposals.¹⁷⁴ Further examinations will be necessary to grant approval to foreign GCIs since the investors may have strategic purposes such as using the influence as political leverage more than making profits.¹⁷⁵

The same concern arose in the US when Huawei Technologies, the Chinese-owned company, attempted to purchase a US technology firm, although Huawei later withdrew its plan. Moreover, even in a report on ‘the Counterintelligence and Security Threat Posed by Chinese Telecommunications Companies Doing Business in the United States’ by the House Permanent Select Committee on Intelligence, the concern on potential economic threats and risks to national security interests of the US was highlighted, as follows:

The Committee on Foreign Investment in the United States (CFIUS) must block acquisitions, takeovers, or mergers involving Huawei and ZTE given the threat to U.S. national security interests. [...]

Committees of jurisdiction in the U.S. Congress should consider potential legislation to better address the risk posed by telecommunications companies with nation-state ties or otherwise not clearly trusted to build critical infrastructure. Such legislation could include increasing

¹⁷¹ Treasurer of Australia, ‘Australia’s Foreign Investment Policy’, 2017, p. 1.

¹⁷² The Australian government prohibited Shell’s takeover bid over Woodside Petroleum Ltd., the Australian Energy company. Shell’s proposal was considered against the national interest. See further P. Costello, Treasurer, ‘Foreign Investment Proposal – Shell Australia Investments Limited’s (Shell) Acquisition of Woodside Petroleum Limited (Woodside)’, *Treasury Portfolio Ministers*, Media release, no. 25, April 23, 2001.

¹⁷³ Treasurer of Australia, 2017, *supra* note 171, pp. 5, 7.

¹⁷⁴ Australia, ‘Guidelines for Foreign Government Investment Proposals’, February 17, 2008, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType> (accessed May 3, 2018).

¹⁷⁵ Treasurer of Australia, 2017, *supra* note 171, p. 10.

information sharing among private sector entities, and an expanded role for the CFIUS process to include purchasing agreements.¹⁷⁶

Such an attitude may partly stem from the US's concern about foreign ownership of critical industries; in this case, a telecommunication industry, and from the political dynamic between China and the US. Whereas generally GCIs are deemed as a potential risk to national security given the idea that the investment can be based on strategic objective rather than market-based one, the attempt for a government to reject foreign investment controlled or owned by a foreign state can involve political considerations in addition to economic ones. The US has criticised the Chinese corporations for causing economic distortions and unfair competition since the state-supported system allowed subsidies. Also, the risk is not confined to military risk such as terrorist attacks but expanding to economic risks in critical infrastructure.

The coverage of the CFIUS' review on foreign investment transactions is to determine whether a transaction threatens (to impair) the national security, or the foreign company is controlled or owned by a foreign government. Or it would result in control over any critical infrastructure which could threaten or impair the national security.¹⁷⁷ However, during the Bush Administration in 2006, an administrative change in the CFIUS review of foreign investment transactions took place. An acquisition transaction of Lucent Technologies Inc. by Alcatel SA, a French company, was approved under one condition that the company was obliged to concede a Special Security Arrangement (SSA), which inhibits the company's access to the previous work done by Lucent's research regarding the communications infrastructure in the US. Further, if the US deemed that a company does not comply with the arrangement, it can invalidate the approval, which causes huge uncertainty in business and fear for arbitrary actions by the CFIUS from the foreign investors' point of view.¹⁷⁸ The US District Court confirmed the CFIUS's authority in one case¹⁷⁹ between a foreign

¹⁷⁶ House Permanent Select Committee on Intelligence, 'Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE: A Report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence', *U.S. House of Representatives*, October 8, 2012.

¹⁷⁷ P.L. 110-49, Section 2, July 26, 2007.

¹⁷⁸ J. Pelofsky, 'Businesses Object to US Move on Foreign Investment', *Reuters News*, December 5, 2006, <https://uk.reuters.com/article/usa-investment/update-1-businesses-object-to-us-move-on-foreign-investment-idUKN0534982920061206> (accessed May 3, 2018).

¹⁷⁹ *Ralls Corporation v. Committee on Foreign Investment in the United States, et al.*, Civil Action Number 12-1513, United States District Court for the District of Columbia.

investor and the CFIUS. The court dismissed the foreign investor's suit, stating that it lacked jurisdiction because the President's decisions are a finality provision, which is not subjected to judicial review. The court also found that the President and the CFIUS do not have an obligation to disclose evidence for review's decision since the CFIUS' investigation is based on classified information.¹⁸⁰

Generally, the US president is less likely to block foreign investment since mergers and acquisitions bids are withdrawn when the CFIUS's investigation is initiated. This is because foreign investors do not like the negative reputation in case their investment in a host country is rejected on national security grounds. However, a recent case presented a seminal example of the president prohibiting a deal¹⁸¹ after more than two decades.¹⁸² Chinese-owned Ralls Corporation planned to invest in Oregon's Wind Farms in 2012. Ralls purchased sites near where the US Navy airspace tests drones without notifying the CFIUS. President Obama ordered the company to divest, by referring to national security concerns.¹⁸³

The CFIUS's authority has been broadened by the concern that foreign investments, especially by foreign GCIs, in critical infrastructures will result in a high vulnerability in the US society. Most economists claim that there is no economic evidence that foreign ownership has a measurable impact on the national economy while some argue that it poses a potential threat or risk to national security. Also, there is little evidence about the differential economic impact between foreign private ownership and investment controlled or owned by a foreign government.¹⁸⁴

When foreign GCIs locate their investment, especially by a take-over, policymakers should observe risks of the foreign investment to their nations. Dealing with foreign investments by GCIs is complicated from an investment recipient country's perspective. Usually, a host country would have liberalised its domestic investment

¹⁸⁰ Ibid.

¹⁸¹ J. Masters and J. McBride, 'Foreign Investment and U.S. National Security, Council on Foreign Relations', September 27, 2013, <http://www.cfr.org/foreign-direct-investment/foreign-investment-us-national-security/p31477> (accessed May 3, 2018).

¹⁸² The last time foreign investment was blocked on the national security grounds was when President George H.W. Bush prohibited a Chinese aero-technology firm's bid over a US manufacturing company in 1990.

¹⁸³ T. J. Keeler, 'President Obama Orders Divestiture of Chinese Investment in US Wind Farms; Investor Mounts Unprecedented Legal Challenge', *Mayer Brown*, October 5, 2012, pp. 1-3.

¹⁸⁴ Jackson, 2018, p. 40.

market in order to attract more foreign direct investment. Simultaneously, it has to consider the effect of the foreign investment in the country. Regarding privately owned enterprises, governments may impose more lenient regulations because the purpose of private investors is in general profit maximisation. On the contrary, concerning foreign investment controlled by a GCI, a state has to contemplate additional restrictions or thorough reviews which such foreign investment is subject to since the objective of the investment may not be business-based. Therefore, as a recipient country, a state has to strike a balance between market liberalisation and restrictions on certain investors' investment in critical industries which have a direct impact on societal and economic well-being. As the restrictions may decrease the efficiency of the economy, states are placed in a situation where they have to determine to what extent foreign companies are allowed in critical infrastructures.

4. Conclusion

By examining the foreign investment policy of the EU Member States, the EU, and North American countries, the discussion in this chapter identified different approaches to national security in foreign investment policies, though the countries have liberal investment policies. Furthermore, the countries acknowledge the close relationship between national security and critical industries.¹⁸⁵ Although the countries' approach to defining critical infrastructures differ, contextually speaking, the differences are not significant. The definitions are more likely to be general than sector-specific.¹⁸⁶ Each definition provides the lists of critical infrastructure sectors such as energy and water supply and telecommunications, but those lists are only illustrative, not exhaustive. The tendency of general definition implies that the meaning and scope of 'critical' can hinge on economic and societal circumstances. Where countries tend not to delineate the scope of critical infrastructure, the concept of national security plays a determinant role in understanding critical infrastructure. Even among the EU Member States, the scope and meaning of national security restrictions in investment policy also vary. The British investment policy is more liberal while the French one is more restrictive, having recently added more industries in strategic sectors which require authorisation for investment. Thus, within the EU

¹⁸⁵ OECD, 2008, *supra* note 166, p. 2.

¹⁸⁶ Although in some cases some policies provide some examples of critical infrastructure sectors, they are illustrative rather than exhaustive.

economic and security framework, the Member States still retain certain rights to interpret their own security and public order to some extent.

In foreign investment policies, security has two main features; one for the traditional understanding of security – the Realist School – to protect any industries related to war and defence such as cryptosystems. The other feature hinges on critical infrastructure, which is closely related to energy security and social security. The evolution of including critical infrastructure within the ambit of national security directly pertains to the examples of governmental interventions in some GCIs' mergers or acquisitions bids in critical infrastructure. Prohibition or restriction of such bids stems from a suspicion that there are non-commercial purposes for the investment. This discourse is not confined only to GCIs; it can be applied to private foreign investors attempting to invest in such industries such as Canada's prohibition on acquisition of MTS, a telecom company by a foreign investor.

Countries' attitudes towards GCIs can be contingent on whether they have GCIs. While home states of GCIs make efforts to protect the rights of GCIs as investors under the IIAs, host states strive to ensure certain policy space in order to prevent GCIs from investing in their country on the grounds of national security.

Regarding national security exceptions, countries formulate more policies and laws to govern new emerging security concerns in the investment arena. It stands to reason how the concept of national security will be formalised where a government wishes to apply it to direct or indirect expropriation. The countries, examined in this chapter, have security clauses in their foreign investment policies, but they only focus on mergers and acquisitions by foreign investors and on the establishment of investment in certain sectors.

Effectively, countries recognise the necessity of protecting certain industries, such as the supply of water and energy, and telecommunications, from investments or acquisitions by foreign investors, especially, where a foreign government is involved in such a transaction. This is because an operational failure in such industries can cause a severe socio-economic impact in society. In addition, GCIs have drawn keen attention for their potential risk since a foreign state's political decision can be implemented in the operation of the GCI. While some countries do not impose any

regulations particularly applying to GCIs, others have implemented restrictions and regulations targeting GCIs, whether sector-specific or general. It is evident that when GCIs attempt to take over domestic industries in critical infrastructures, they are subject to more stringent rules, given their potential to have more catastrophic ramification. However, it is still controversial if the ownership should be the reason for stricter rules since home states tend to claim that they are not involved in the operation of the investment. While this chapter mainly examined the level of restrictions and regulations imposed on GCIs, the next chapter discusses private individual foreign investors.

CHAPTER 4

The Role of the Concept of National Security in Individual Foreign Investment

1. Introduction

The discussion in Chapter 2 and Chapter 3 elaborated on how the concept of national security can play a role in the context of foreign corporate investment and foreign investment controlled by government. It examined the controversy over preventing foreign investment on the grounds of national security and public interest. It was concluded that GCIs are inevitably subject to more stringent rules because investment by GCIs has more risks than private investment in that their operation may be driven by political decisions rather than commercial profits. Interestingly, the idea that GCIs have more risks than corporate investors should not be taken for granted. Instead, investment should be investigated on a case-by-case basis in order to support the optimal allocation of capital. While Chapter 2 and Chapter 3 demonstrated how the concept of national security is applied to regulating investment by foreign company and investment by foreign government, respectively, this chapter will shift the focus from collective action to individual action. In particular, it will examine if there is any relation between national security and individual foreign investors who become citizens or hold a certain residence permit under a special immigration programme.

Special immigration programmes have been devised and implemented in order to attract foreign capital into a country. To attract foreign investments, host states have introduced a myriad of incentives such as tax-free zones or tax incentives. They have also pledged themselves to provide foreign investors with fair and equitable treatment and to secure liberal foreign investment market such as guaranteeing transfer of capital. Notwithstanding, host states, especially developing countries, have not attracted foreign investment as much as they expected, despite giving up part of their policy space. As part of new initiatives, several countries have granted a foreign investor citizenship, or a residency permit on condition of certain requirements so that foreign investors can enjoy incentives conducive to their investment and even gain the

rights of citizens of host states.¹ Compared to citizenship-by-investment programmes which are implemented by a few countries, permanent residence permits or golden visas for foreign investors have been more widely introduced.² As part of measures to become an attractive investment destination, enhance economic growth and foster jobs, host states issued permanent residence permits to foreign investors. However, the economic benefits arising from the permanent residence permits were evaluated questionable, as will be discussed below. Also, countries – such as Malta and Cyprus, which were severely affected by the financial crisis, and Caribbean islands³ which are in need of government revenue and foreign capital for renovation of industry and infrastructure development – began to contemplate citizenship schemes by investment or donation.⁴ The programmes promise to provide quality of life, preferential tax rates, access to education, residence and the benefits of visa-free travel to a number of countries. Moreover, those benefits become augmented if the country providing such a type of scheme is an EU Member State. In other words, where an applicant is granted nationality of an EU Member State, such as Malta and Cyprus, by extension, the applicant can hold EU citizenship. In a few European countries, an investor citizenship scheme has been implemented to provide more favourable investment market.

In general, to be naturalised, a foreign investor, who applies for the scheme, (i) must have resided for a certain period of time; and (ii) must have invested a certain amount of capital in the country in question. Granting citizenship to a foreigner is not new, but the basic requirement, either by registration or by declaration, is legal recognition conferred by a public authority. By being bestowed citizenship, a foreign investor becomes a naturalised citizen.

However, to attract foreign capital, the economic crisis in Europe led a few EU Member States to propose an investment-based citizenship scheme which does not require residence history. Particularly, the Maltese government in October 2013 drafted an initiative which accords Maltese and European citizenship to individual

¹ M. Sumption and K. Hooper, 'Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration', *Migration Policy Institute*, October 2014, p. 2.

² See further Best citizenships, <http://best-citizenships.com/> (accessed May 4, 2018); and J. Džankić, 'Investment-based Citizenship and Residence Programmes in the EU', *EUI RSCAS*, no. 2015/08, 2015, pp. 15-18.

³ Saint Lucia, Antigua and Barbuda, and St. Kitts and Nevis.

⁴ Sumption and Hooper, 2014, *supra* note 1, p. 1.

foreign investors who can make an economic contribution of at least €650,000. The proposal generated a heated debate on the legitimacy of citizenship granted under the scheme inside and outside the country.⁵ Especially, the European Parliament and the European Commission officially demonstrated their opposition to the scheme.⁶ Thereafter, the Maltese government made several amendments by requiring an applicant to reside for 12 months before issuance of passport⁷ and to invest in approved financial instruments. Additionally, an applicant must retain a residence in the country. The residence condition requires an applicant to own or lease a property, thereby increasing the amount of capital necessary for gaining citizenship from €650,000 to €1,150,000 in total – €650,000 donation to National Development and Social Fund, €150,000 investment in financial instruments and €350,000 minimum property price.⁸

Unlike corporate investors and GCIs, private investors under citizenship-by-investment schemes are subject to different security considerations. To explain distinctive features of this type of investors, this chapter will discuss the controversies surrounding such schemes and will shed light on questions about their legitimacy. It will thereafter consider citizenship-by-investment schemes by country: Caribbean countries of St. Kitts and Nevis, and Antigua and Barbuda, and European countries including Malta, Cyprus, Bulgaria, Romania and Ireland. It will then discuss immigrant residence permit programmes. The chapter will also analyse the implications of both types of programmes in the context of national security. More specifically, it will probe into whether those programmes can pose a risk to national security as well as in what cases individual foreign investors' citizenship can be revoked on the grounds of national security.

⁵ See further, A. Shachar and R. Bauböck (eds), *Should Citizenship be for Sale?*, EUI RSCAS, no. 2014/01, 2014.

⁶ M. Dalli, 'IIP, Brussels Contemplating Infringement Proceedings against Malta', *Malta Today*, January 18, 2014, <http://www.maltatoday.com.mt/news/national/33227/iip-european-commission-contemplating-infringement-proceedings-against-malta-20140118#.V1RjbvkrLIW> (accessed May 4, 2018).

⁷ The Maltese programme includes the processing time, which is 4 months, in the residence requirement of 12 months. Hence, applicants need not apply for citizenship after residing for 12 months. Rather, they can apply for citizenship if the issuance of passport will take place after 12 months from date of initial residency.

⁸ A. Shachar, 'Dangerous Liaisons: Money and Citizenship', in A. Shachar and R. Bauböck (eds.), *Should Citizenship be for Sale?*, EUI RSCAS, no. 2014/01, 2014.

2. Controversies over Investment Citizenship Schemes

It is a general notion that a sovereign state has the exclusive authority to regulate its nationality by law or policy. However, the citizenship-by-investment schemes generated controversies and criticisms, not only within the implementing countries, but also in other countries, international institutions and academia. Although all the citizenship-by-investment schemes have general implications, including the concern of negatively influencing established values and meaning of citizenship, criticisms against the scheme varied based on whether there was particular emphasis on the financial requirement or the host state is an EU Member State. For example, the Maltese government's recent proposal on citizenship for foreign investors generated the most heated debate within and outside Malta. Outside Malta, the main objections against citizenship-by-investment schemes were centred on the assumptions that (a) the scheme reduced the value of citizenship and (b) placed the entire citizenship of the EU at stake.⁹ Otherwise, the EU institutions could not have intervened in Malta's draft on citizenship scheme since a state exclusively retains the regulatory space over nationality. The grouse of the European institutions against the Maltese scheme was it lacked a 'genuine link' between an individual and a Member State of the EU to acquire citizenship.¹⁰ Notwithstanding, this argument raises the question regarding what a genuine link is in the realm of citizenship. The then Vice President of the European Commission, Viviane Reding, remarked that "in compliance with criteria under public international law, Member States should only award citizenship where there is a genuine link or connection to the State in question" while taking into consideration the potential impact of national policy on citizenship onto the other Member States and the EU.¹¹ It has been claimed that there should be a certain connection such as physical, emotional or genetic between the state in question and the individual in order to gain citizenship of the state.¹²

⁹ European Parliament, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU', European Parliamentary Research Service, PE 627.128, October 2018, p. 5.

¹⁰ Ibid.

¹¹ V. Reding, 'Citizenship Must not be up for Sale', *European Commission*, Speech/14/16, January 15, 2014, para. 7.

¹² J. Balzan, 'Citizenship is Priceless-Simon Busuttil', *Malta Today*, October 30, 2013, <https://www.maltatoday.com.mt/news/national/31099/citizenship-is-priceless-simon-busuttil-says-20131030#.WuxflqTt7cs> (accessed May 4, 2018).

However, whilst the Maltese citizenship-by-investment scheme is the first case where the EU officially expressed concern over a Member State's regulation on nationality, it is not the first citizenship scheme in the EU. For instance, Cyprus offered foreign investors citizenship without requiring prior residence to compensate their loss in bank deposits during the financial crisis.¹³ Furthermore, Malta claimed that Austria¹⁴ also has a similar scheme – but investors who were naturalised by the Austrian scheme remain unreported since the process is deemed as an official secret, leading to a lack of transparency and corruption.¹⁵

This section discusses the controversy over the citizenship-by-investment schemes on the basis of the notion of a genuine link. The next discussion will examine the idea of citizenship as a marketable commodity and ramifications thereof, such as deteriorating democracy. This is important because foreign investors who naturalise under a citizenship-by-investment programme are exempt from certain conditions that apply to a normal naturalisation application, such as the level of integration. Also, the lower thresholds applied under this programme in exchange for money and investment raise security concerns about this type of investors. Given that the implementation of such a scheme by an EU Member State can confer EU citizenship on a foreign investor, this thesis will undertake a discourse on the scheme at the EU level.

2.1. A Genuine Link and Solidarity

As former Vice-President Reding underlined, a Member State should grant citizenship on the basis that there is a link or connection between an individual and a state, such as the individual's political or societal participation in the polity and attachment to the country. Furthermore, the importance of prior attachment and a certain connection in the context of nationality has been highlighted by the ICJ, especially in *Nottebohm*.¹⁶ Nottebohm who had resided in Guatemala from 1905 to 1943 gave up his German

¹³ Džankić, 2015, *supra* note 2, p. 8.

¹⁴ P. Cooke, 'Austria Denies Having Citizenship by investment programme', *Times of Malta*, 2014.

¹⁵ According to Austria, Art.10 (6) of the Austrian Citizenship Act (BGBl. No. 329/1985) has not been invoked for granting citizenship for years.

Article 10 (6) states prior residence will not be acquired "if the Federal Government confirms that the granting of nationality is in the particular interests of the Republic by reason of the alien's actual or expected outstanding achievements."

¹⁶ *Nottebohm Case (Liechtenstein v. Guatemala)*; Second Phase, International Court of Justice (ICJ), April 6, 1955, p. 22.

nationality, and applied for Liechtenstein (which he visited a few times) citizenship in 1939, in order to avoid a sanction as a German citizen since Guatemala and Germany had a hostile relation due to the Second World War. He did so notwithstanding that he had a chance to become a citizen of Guatemala, but never applied for Guatemala citizenship. After being granted Liechtenstein citizenship, he visited Guatemala. However, he was denied entry and had his possessions confiscated because the authority determined that the naturalisation process was not legitimate, thereby considering Nottebohm a German. The Liechtenstein government provided diplomatic protection to Nottebohm since the confiscation was regarded as unjust treatment by submitting a claim to the ICJ. In response to the claim, the Guatemala government insisted that Nottebohm's naturalisation did not occur in accordance with international principles on nationality. While the ICJ in its judgement recognised the prerogative for every state to implement its own legislation on nationality, the court agreed with Guatemala that the naturalisation process must comply with international principles.¹⁷

While this notion has been widely accepted and confirmed in international tribunals as well as in the literature of citizenship and been operationalised in legal frameworks of most countries, the determination of the effectiveness of nationality based on the genuine link test has room for criticisms. The dissenting opinions of Judges Klaestad, Read and Guggenheim of *Nottebohm* questioned the validity of the link theory/the test of effective connection. In particular, Judge Read criticised the notion of genuine link for its vagueness and subjectivity, which could allow states to have more discretionary power in the process of naturalisation, advocating objective tests for naturalisation for increased certainty.¹⁸ Judge Guggenheim also noted that international law does not contain any rule on "the effectiveness of nationality depending on a bond between the naturalising state and the naturalised individual."¹⁹ He further pointed out that the permanent residence could create more rights and duties of an individual to the state of his permanent residence than those to the state of which he is a national,²⁰ which attests to a close link between the state and the individual. This dimension of

¹⁷ Even in the *Nottebohm* case, despite that the diplomatic protection claimed by Liechtenstein was not upheld, the nationality of Liechtenstein was recognised since it is the state's prerogative to determine who can obtain its citizenship.

¹⁸ *Nottebohm* Case, *supra* note 14, Dissenting Opinion of Judge Read p. 46.

¹⁹ *Ibid*, Dissenting Opinion of M. Guggenheim, Judge "Ad hoc", p. 57.

²⁰ *Ibid*.

citizenship thus leads to questioning the applicability of the genuine link test in the process of naturalisation.

Frequently, citizenship-by-investment schemes are compared to fast-track citizenship opportunities for talented people, such as Olympians, given that they do not require prior residence. Conversely, it is also argued that citizenship-by-investment schemes are fundamentally different from the conferral of citizenship on sports players. There is an expectation that sports players granted expedited citizenship should be loyal to the conferring state since the main reason for conferring the citizenship was to earn the state a global reputation. According to Jelena Džankić,²¹ the naturalised citizen having a sports talent can quickly win the state a collective pride flying its national flag. Hence, a bond with other citizens which replaces a prior residence requirement for solidarity. On the contrary, the contribution of an investor does not trigger solidarity or a social bond in the same manner. Thus, lack of solidarity, where naturalised investors face difficulty in operating their business and generating profits in the country, can result in disavowal, instead of continued, citizenship, their citizenship. It could be argued that requiring an investor to invest €150,000 in stocks or bonds, in the Maltese case may cause a future connection in a longer term. Yet, the connection is only based on economic profits, devoid of the ability to display allegiance and continue the connection. Therefore, the citizenship-by-investment scheme is highly controversial regarding the connection between an applicant and the country in question. Since the essential purpose of the citizenship-by-investment scheme is attracting economic resources into the country, whereby the investors who apply for citizenship are expected to make an economic contribution in the country by donation or investment at present and in the future, the type of allegiance or connection expected for the investors differs from other naturalised citizens or citizens by birth.

Despite the difference between the two fast-track citizenship schemes, both types of citizenship schemes have some commonality in that both lack a prior attachment. The reason why a sports player chooses another nationality is not that the player is attached to the particular country; but because the player can benefit from citizenship rights such as economic incentives or a better sports environment. Moreover, even if sports

²¹ J. Džankić, 'Citizenship with a Price Tag: The Law and Ethics of Investor Citizenship Programmes', *Northern Ireland Legal Quarterly*, vol. 65, no. 4, 2014, p. 394.

players may have renounced their previous citizenship, it does not mean that the “genuine” connection with the state whose citizenship is given up has been eliminated. Accordingly, where the legitimacy of citizenship-by-investment schemes is questioned, for lack of prior attachment or the difficulty to create a bond in society, it is inevitable to question the legitimacy of fast-track citizenship programmes for sports players.

By the same token, if the legitimacy of citizenship should be solely determined on the existence of a genuine link, it is inevitable to challenge citizenship of those who emigrated after being born in a country, whilst retaining their citizenship that country, since a country of origin does not effectively prove a genuine link. Notwithstanding, the idea that physical presence can bring about a particular link with the country to some extent cannot be questioned. Džankić highlighted that the duration of residency in the state transforms the “stockholder citizen” into a true stakeholder in the polity.²² Many scholars of citizenship have also emphasised the importance of physical existence.²³ This is because the interaction during the presence in the polity enables an individual to act as a political equal, irrespective of economic class. However, given that a certain period of residence in a polity makes an individual a true stakeholder, when the person leaves the country and stays in another polity for a similar duration, the status of true stakeholder will be downgraded to a stockholder citizen again even if the person has not lost the “link” or connection with the country of origin. That is why, in a globalised world, the concern remains regarding how meaningful the history of physical presence can be. Although social assimilation of individuals into society is imperative and a prior attachment can help such assimilation; however, a prior attachment alone should not necessarily be determinative because a prior attachment can stem from various reasons such as parents or spouse, rather than participation in the society. In that sense, the notion of a prior attachment should not be used to oppose citizenship-by-investment schemes since every person creates a bond with particular society in a different way.

²² Ibid; the paper referred to Bauböck’s ‘stakeholder principle’ from R. Bauböck, ‘Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting’, *Fordham Law Review*, vol. 75, 2006.

²³ P. Ochoa, ‘What Money Can’t Buy: Face-Face Cooperation and Local Democratic Life’, in A. Shachar and R. Bauböck (eds.), *Should Citizenship be for Sale?* EUI RSCAS, no. 2014/01, 2014, p. 24.

Besides, depending on the country, the level of allegiance and attachment required for citizenship varies. For example, some countries permit dual or plural citizenship whereas other countries illegalise dual citizenship, i.e. a more exclusive approach to nationality. In granting citizenship, each country requires a different period of residence in the polity for regular applications although the prior residence requirement can be alleviated or even waived through expedited programmes or citizenship-by-investment programmes. This signifies that the understanding of a sufficient link between an individual and a state for the sake of citizenship varies by country. Further, the main reason why the meaning of a genuine link should be questioned is that scholars might have taken for granted the traditional understanding of a genuine link that is subject to adaptation and evolution as borders between countries have been blurred. By the time the concepts of dual citizenship, cosmopolitanism and transnationalism are recognised,²⁴ the meaning of commitment or allegiance does not exclusively indicate the traditional notion of loyalty which is isolated and exclusive from other countries.

Stephen Hall suggests that conferral of nationality on a person without a genuine link to the state is not consistent with international rules on citizenship since the person's interest could be 'ephemeral or abusive',²⁵ which eventually violates the rules enunciated in *Nottebohm*. While Hall highlights the importance of a genuine link in case of granting citizenship, according to Elspeth Guild, the notion of genuine link can be misused in order for a state to exclude certain groups of people from its citizens, i.e. violating non-discrimination rules, by applying standards such as social ties or assimilation tests based on culturally driven factors.²⁶ Thus, emphasising the genuine link can lead to nationalism which again leads to a discriminatory approach in implementing naturalisation regulations.

²⁴ P. Spiro, 'Dual Citizenship as Human Rights', *International Journal of Constitutional Law*, vol. 8, no. 1, 2010.

²⁵ S. Hall, *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht: Martinus Nijhoff Publishers, 1995.

²⁶ E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, 2004, pp. 68-81.

Magni Berton argues that those who invest in the future of the state are entitled to citizenship²⁷ since an investment-based interest is sufficiently significant. Rainer Bauböck criticises this idea because it can amount to arguing that a global investor is entitled to any types of citizenship since he/she invests the world over. He also argues that the idea undermines the value of citizenship by highlighting “the equal status of all members of a polity.”²⁸ Bauböck noted that self-interested and impersonal motivations, with a lack of solidarity and humanitarian commitment which can be created, during the period of residency, in every likelihood, will give rise to fragmentation within society. The residence in the country does not only indicate the physical presence in the society but also implies that an individual develops its “sense of belonging to community” “with inclusion in society and politics.”²⁹ However, that argument precludes the possibility that an investor granted citizenship under the scheme will not belong to the community societally and emotionally in the future. Individuals applying for such a programme can look for a place which can provide a better quality of life with advanced infrastructure and education for their family. Such applicants are willing to be assimilated into society. This emphasises prior residency, but “a genuine link” could lead to excluding the possibility of building a future connection and solidarity in society. Due to the possibility of social fragmentation caused by a group of people who have difficulty in settling in a country and, of other illicit financial activities, such programmes constantly call for governmental scrutiny on applicant’s background and for a device for new settlers to be able to establish solidarity between them and the country concerned.

2.2. Commodification of Citizenship and Democracy

While the meaning of such a link is highlighted in the context of citizenship-by-investment schemes without requiring reasonable prior residence, critiques argued that these schemes have commodified citizenship. Bauböck claims that a citizenship-by-

²⁷ Magni-Berton, R., ‘Citizenship for those who Invest into the Future of the State is not Wrong, the Price is the Problem’, in A. Shachar and R. Bauböck (eds.), *Should Citizenship be for Sale?*, EUI RSCAS, no. 2014/01, 2014, p. 11.

²⁸ R. Bauböck, ‘What is Wrong with Selling Citizenship? It Corrupts Democracy!’ in A. Shachar and R. Bauböck (eds.), 2014, *Should Citizenship be for Sale?*, EUI RSCAS, no. 2014/01, 2014, p. 20.

²⁹ D. Kostakopoulou, ‘Thick, Thin and Thinner Patriotisms: Is this all there is?’, *Oxford Journal of Legal Studies*, vol. 26, no. 1, 2014, p. 73.

investment scheme places citizenship within the category of a “marketable commodity”, thereby using the rule of money to increase the possibility of corruption in democracies.³⁰ He refers to the case of Frank Stronach who lost his Austrian nationality when he took up Canadian citizenship, having established a significantly profitable business in Canada. He reacquired Austrian citizenship under a special provision which does not require prior residence or renunciation of another citizenship³¹ when he set up the European headquarters of his business in Austria.³² After being granted Austrian citizenship, Stronach got involved in Austrian politics, by leveraging on his wealth. Bauböck criticises the way Stronach regained his citizenship through his investment, arguing that such conferral of citizenship could lead to political corruption. Bauböck raised an unchallengeable point in that money should not taint the spheres of politics and citizenship.

However, *realpolitik* has already allowed many people to leverage their wealthy background to gain political influence. This statement does not uphold or attempt to justify such a way of political influence. Instead, given the possibility of unfair political involvement, granting citizenship to investors in local industries requiring innovation and development, and those who can make large monetary donation to a country, should not be banned. Additionally, if a governmental authority grants citizenship under a certain citizenship legislation other than a citizenship-by-investment programme – which waives the prior residence requirement in exchange for monetary contributions – or discretionally due to current or future contributions in the country, it becomes even more difficult to achieve transparency given the lack of due diligence. Moreover, the lack of procedural and substantive transparency becomes poignant where the exact number of investment or contributions made are not state. Importantly, the foregoing discussion does not necessarily mean that providing a legal framework to the citizenship-by-investment schemes can engender transparency. The programmes can achieve transparency as long as the authority undertakes a proper due

³⁰ Bauböck, 2014, *supra* note 28, p. 20.

³¹ Art.10 (6) of the Austrian Citizenship Act states prior residence will not be acquired “if the Federal Government confirms that the granting of nationality is in the particular interests of the Republic by reason of the alien’s actual or expected outstanding achievements.” This article has been invoked to naturalise famous artists and sportsmen.

³² Bauböck, 2014, *supra* note 28, p. 20.

diligence process and reveals specific information about applicants in order to prevent arbitrary decisions.

Džankić also points out that if citizenship becomes a commodity, there will be “a race to bottom”.³³ This suggests the possibility of host states decreasing the required amount of donation or investment to outdo one another. However, the concept of a race to bottom can be more adequately applicable in the situation where the relationship between countries and foreign investors becomes asymmetrical since a race to bottom is based on the premise that providing incentives to foreign investors can significantly confine regulatory space. Therefore, the citizenship-by-investment schemes may not be understood as a race to bottom in that a government has the discretion on granting or denying, including revoking, citizenship.

Meanwhile, Kochenov argues that the traditional concept of citizenship has been weakened by underlining the importance of advocating human rights or other universal values in conjunction with globalisation.³⁴ Globalisation has resulted in transforming nation-states and multiple actors which are not identified as a state at different levels. Also, globalisation and the emergence of cosmopolitanism have contributed to establishing the concept of post-national citizenship. Thus, the significance of national identities and institutions has been weakened compared to global institutions.³⁵ The EU has also shown similar trend in that the Member States accepted “de-ethnicised” models for citizenship.³⁶ There are a variety of reasons for this phenomenon. Contemporarily, liberal states do not expect all the citizens to have a homogenous cultural background or ethnicity, and to behave in a certain way.³⁷

Similarly, Peter Spiro points out that globalisation has altered the conventional meaning of citizenship, and the commodification of citizenship may have inevitably

³³ Džankić, 2015, *supra* note 2, p. 20.

³⁴ D. Kochenov, ‘Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship’, *EUI RSCAS*, no. 2010/23, 2010.

³⁵ S. Sassen, ‘Towards Post-National and Denationalized Citizenship’, in E. Isin and B. Turner (eds.), *Handbook of Citizenship Studies*, London: Sage, 2002, pp. 277-281.

³⁶ D. Kostakopoulou and A. Scharuwen, ‘Olympic Citizenship and the (Un)Specialness of the National Vest: Rethinking the Link between Sport and Citizenship Law’, *International Journal of Law in Context*, vol. 10, no. 2, 2014, p. 152.

³⁷ Kochenov, 2010, *supra* note 29, p. 4.

taken place by virtue of globalisation.³⁸ Accordingly, Spiro argues that commercialisation of citizenship is one of the ramifications of globalisation, not a cause. Hence, citizenship law cannot prevent the evolution of citizenship. Globalisation has provided the theoretical ground for selling citizenship to foreign investors. It is pregnable to claim that the citizenship programme is a corollary of the globalisation because many countries still do not implement such programmes and some of them expressly ban dual citizenship.

Another political aspect of the citizenship programme regarding democracy is right to vote and diplomatic protection. Opponents of citizenship-by-investment programmes would claim that bestowing citizenship on a wealthy investor is contrary to democratic values, such as fairness and non-discrimination. This is because a wealthy investor has the right to participate in more than one polity by gaining another citizenship, thereby questioning the notion of dual citizenship. In response, Spiro explains that the advent of human rights as an international norm – the protection of an individual against arbitrary actions imposed by government – has devalued the advantage of dual citizenship.³⁹ Bauböck also notes that dual citizenship per se does not violate complex equality to the extent that citizenship of one state will not benefit an individual in the state of the person's additional citizenship,⁴⁰ so long as the principle of one vote for one person is not violated.

Given the introduction of the citizenship-by-investment schemes, citizenship has lost its traditional meaning. However, on a close scrutiny, the practical meaning of such programmes is to rescue a country's economy from deep recession. Some countries which underwent economic recession had implemented other methods to attract foreign investment, but failed. Some of the governments required immediate funding develop infrastructure or particular industries or to recover current account deficits. Thus, they encouraged foreigners to make investment in government bonds.

³⁸ P. Spiro, 'Cash-for-passports and the End of Citizenship', in A. Shachar and R. Bauböck (eds.), *Should Citizenship be for Sale?*, EUI RSCAS, no. 2014/01, 2014.

³⁹ Spiro, 2010, *supra* note 24, p. 125.

⁴⁰ R. Bauböck, 'Towards a Political Theory of Migrant Transnationalism', *International Migration Review*, vol. 37, no. 3, 2003, p. 717.

2.3. Controversy at EU Level

As aforementioned, when Malta proposed a citizenship-by-investment scheme, the EU institutions officially expressed their negative opinions against the proposal by underlining that the scheme could put the whole EU citizenship at stake. In line with the discussion on the commodification of citizenship, some commentators argued that such schemes inevitably place entire EU citizenship into the category of commodity. Sergio Carrera argues that selling citizenship through investor citizenship schemes is ‘commercialisation of EU citizenship’, thereby allowing free-riding insofar as Malta or Cyprus can benefit from what other EU Member States have paid for and jeopardising the substantial meaning and values of the EU such as sincere cooperation.⁴¹

Džankić⁴² analyses the EU Member States’ exceptional citizenship schemes. The analysis shows that most of the EU Member States have special provisions which allow a state to loosen the conditions for conferring citizenship by reason of special or national interest.⁴³ Džankić highlights the paradoxical connotation of the EU citizenship given that one Member State’s nationality policy can lead to distorting the citizenship regimes of other countries.⁴⁴ She refers to this dynamic as a paradoxical iterative relationship between national and EU citizenships. This is because the EU Member States were concerned about the possibility of whether EU regulations on nationality and citizenship may limit their regulatory space on nationality. A model for such a concern can be the Danish opt-out regarding citizenship on the process of European integration in the Maastricht Treaty. Such a concern was taken into account by countries other than Denmark. Those countries including the current EU Member States had the question whether the concept of EU citizenship would prevent the EU Member States from implementing their own rules. However, the recent cases of the Maltese and the Cypriot citizenship schemes showed that, contrary to such a concern,

⁴¹ S. Carrera, ‘How Much does EU Citizenship Cost? The Maltese Citizenship-for-sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?’, *CEPS Paper in Liberty and Security in Europe*, no. 64, 2014, p. 28

⁴² Džankić, 2015, *supra* note 2, pp. 6-8.

⁴³ Some countries use the term “special interest”; some use “public interest” while others use “the interest of the country”. Among them, some provisions have stipulated the list of specific interests such as science, commerce, culture, or sports whereas some have not illustrated those interests, but rather stated public, national or special interest.

⁴⁴ Džankić, 2015, *supra* note 2, p. 1.

an EU Member State could take advantage of the status as an EU Member State in the realm of citizenship. Džankić criticises such an approach to EU citizenship to the extent that if a Member State sees EU citizenship as an opportunity, it can negatively affect other EU Member States' naturalisation processes.

The EU institutions' intervention in the Maltese citizenship-by-investment scheme highlighted the extent of the Member States' discretion and the extent of the EU Commission and Parliament's intervention and restriction on the Member States' authority in citizenship matters. Especially, if a Member State of the EU implements such a citizenship-by-investment scheme, the scope stretches from a domestic (internal) issue to other Member States' issues, and by extension the whole of EU. This is because, as alluded to earlier, citizenship conferred by an EU Member State entails one passport for the country and one EU passport. Therefore, it has been discussed if such a scheme complies with the EU principles and legislation on nationality regarding EU citizenship.

As referenced above, the introduction of EU citizenship raised concerns regarding states' regulatory space in the field of citizenship. Accordingly, the realm of nationality was protected from other EU institutions' intervention in order to respect the Member States' autonomy in the field. The non-intervention approach from another Member State can be found in the *Micheletti* decision⁴⁵ in which the ECJ found that once a Member State confers citizenship on someone, other Member States shall not question the decision, for instance alleging lack of a genuine link for the sake of legitimising prohibition to the rights of EU citizenship. Conversely, in the *Micheletti* case, the ECJ held that despite the autonomy of Member States in the field, nationality laws and policies should have 'due regard to EU law' considering the impact of conferral of EU citizenship.⁴⁶

EU citizenship involves the general right to non-discrimination on the grounds of nationality, including the right to move and reside freely within the EU. Despite the deference to the sovereignty of Member States, Member States' exclusive competence over nationality can be limited because a citizenship regulation of a Member State can

⁴⁵ Case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* (*Micheletti* case) [1992] ECR I-04239, para 14.

⁴⁶ *Ibid.*

affect the rest of the EU Member States. Thus, this necessitates the ground that the Member States must have due regard to EU law when exercising their competency in the field of citizenship and nationality. In line with *Micheletti*, the limitation of a Member State's competence in this field can also be found in *Rottmann v Freistaat of Bayern*: "Member States must exercise their powers in the sphere of nationality having due regard to EU law; hence competent Member States should take into account the importance of conferring citizenship of the EU while their discretion is exercised."⁴⁷ Accordingly, Advocate General Maduro opined that such exercise is subject to the obligation to conform to the EU rules, which accentuated the obligation of Member States in the realm of citizenship.⁴⁸

Although the Member States should have due regard to EU law, there is no specific explanation on the extent of due regard. AG Maduro of *Rottmaan* case suggested that Article 4.3 of Treaty on European Union (TEU) on the principle of sincere cooperation should be applied in the exercise of competency in the realm of nationality.⁴⁹ Simultaneously, the Member States shall refrain from taking any measures which could jeopardise the attainment of the EU's objective. Moreover, this implies that the ECJ can interpret those measures using the article in a teleological way.

The initial Maltese scheme without a residency requirement was also criticised for its free-ride at EU level. As other EU Member States have their own citizenship-by-investment scheme, the Maltese scheme which had only a financial condition could let other investors have a freeride in other EU countries, and could distort other Member States' nationality regulations.

The EU passed the 2003/109 Directive to harmonise residence right for an extended period of time at EU level. The Directive provides for rules regarding residency – legally and continuous for 5 years in a Member State – and economic stability. The Directive also gives certain discretion to the Member States to implement their own rules, if necessary. The Directive allows the Member States to issue residence permits, whether permanent or unlimited, which can be more favourable than ones provided

⁴⁷ Case C-135/08, *Janko Rottman .v Freistaat Bayern (Rottmann case)* [2010] ECR I-1449.

⁴⁸ Opinion of Mr Advocate General Poiares Maduro on *Rottamann* case (Case C-135/08), September 30, 2009, para 26.

⁴⁹ Ibid para 30.

under the Directive. Recital 17 of the Directive states that it does not restrain the Member States from applying more favourable national rules, but for the sake of the Directive, permits granted on more favourable conditions do not give the right to reside in other EU Member States. The EU does not ban the Member States from having their own rules, but if the Member States provide more favourable legislation regarding residence permits which can affect the rest of the EU, the EU can deny the rights of EU residency permits such as the right to reside and move freely within the EU. The legality exists only if the conditions of the Directive are fulfilled, including residency for five years in a Member State. However, this is limited to residence permits without including citizenship.

There are two views regarding if EU Member States need to have a consultation with EU institutions or other EU Member states. Contrary to AG Maduro's opinion in the *Rottmann* case, D' Oliveira argues that the lack of consultation regarding nationality regulations, does not necessarily mean a violation of the EU principle including solidarity and sincere cooperation.⁵⁰ According to D' Oliveira, this is because any players including the Member States and any EU institutions did not request any revision before regarding such principles to the Member States since 1957. Hence, the lack of solidarity between the EU and the Member States, caused by no consultation, seems not an issue.

The Maltese citizenship scheme case gave rise to a strong reaction from the EU institutions including the Commission and the Parliament. Both institutions highlighted that the programme failed to pursue loyalty and sincere cooperation as an EU Member State. However, one author suggested that 'duty of loyalty', that is, specific obligations, hinges on the facet⁵¹ of the EU's interest.⁵² In other words, the meaning of the duty of loyalty, including cooperating or consulting with the EU Commission, as an EU Member State can vary depending on the facet of the EU interest which is specified in Article 4.3 of TEU. This implies that even as regards the

⁵⁰ H. U. J. D' Oliveira, 'Nationality and the European Union after Amsterdam' in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Hart Publishing, 1999, p. 405.

⁵¹ Neframi illustrates the EU's interests as effective implementation of common rules, the preservation of *effet utile* – the principle that the interpretation which best serves the practical effect of EU law will prevail, facilitation of the exercise of the EU competence, unity of external representation for the EU and the Member States. See further, E. Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations', *Common Market Law Review*, vol. 47, 2010.

⁵² Ibid p. 325.

same issue, depending on the facet of the EU's interest, the EU institutions can react in a different manner. Thus, in this case, the interest of the EU can be the meaning of EU citizenship and potential impacts on the other Member States. Furthermore, this may imply the EU can react to a similar citizenship-by-investment scheme differently.

The underlying meaning of the citizenship-by-investment scheme will be commercialising EU citizenship. Carrera points out that the most contestable factor of the citizenship-by-investment scheme is placing a private-sector agent as the intermediary between the state and non-EU Member nationals who wish for EU citizenship.⁵³ By appointing a private sector to filter foreigners, the primary criterion lies on a commercial aspect. Carrera further explains that when the commercial point is focused, then the value of Maltese citizenship per se will be less of interest than the value of EU citizenship.⁵⁴ In other words, people who are willing to reside and move within the EU will pay money to Malta in order to have the right to live in the other EU Member States, not Malta. This means Malta becomes a free rider by taking advantage of its "margin of manoeuvre" as an EU Member State.

Therefore, from the perspective of the European Commission and the Parliament, commercialising citizenship is to "jeopardise the substance of citizenship of the Union and its common nature to nationals of EU countries". The scheme is also discriminatory because richer foreigners can be awarded citizenship through a fast-track scheme, which is not consistent with Article 3.3 of the TEU that Member states "shall combat social exclusion and discrimination..." Thus, under Article 3.3 of the TEU, selling citizenship to those who want to have free movement within the EU is against the ethos of the EU market. The Commission stated that there should be "an effective residence status in the country" prior to the acquisition of Maltese nationality for a genuine link or genuine connection. However, as aforementioned, the notion of a genuine link is contestable, and the sole emphasis on the role of this link in citizenship can lead to arbitrary decisions. This approach is supported by Kristine

⁵³ Carrera, 2014, *supra* note 41, pp. 25-28.

⁵⁴ *Ibid.*

Kruma who argues that there has been little consensus on the definition and scope of the genuine and effective link among scholars and international or Community laws.⁵⁵

Regarding this issue, Carrera argues that criticising the Maltese citizenship-by-investment scheme based on the genuine link argument is inappropriate.⁵⁶ As mentioned in the previous section, the argument of the genuine link may cause nationalism in the field of citizenship, thereby breaching the fundamental objectives of the EU – the pursuit of non-discrimination, social justice and fundamental rights. Therefore, he calls for more precise guidelines at the EU level involving restrictions which the EU Member States should take into consideration where the Member States bestow citizenship in complying with sincere cooperation under EU law. Although EU institutions should not intervene with nationality law *per se*, if Member States' rules are granting citizenship to those who seek EU citizenship in order to gain the right to reside and move freely in the other Member States, the rules will be in the EU's interests, subject to reviews as to whether the rules are reasonably designed.

Spiro suggests the expected impacts of the programme on a global level, an EU level and a national level.⁵⁷ The Maltese programme has a cap of 1800 successful applications, thereby accepting 1800 citizens with few quantitative implications.⁵⁸ Moreover, the limited number of recipients diminishes the potential impact on other countries where a prospective applicant can travel without a visa. For instance, EU citizens can travel to the US without a visa. Spiro adds that at the EU level, those who are granted citizenship under such a programme will be dispersed within the EU such as Germany, France or the UK. In other words, the effect of the programme will be more significant in the EU than in those countries which have visa-free-travel agreements with the EU. Since each EU Member State has the competence to determine nationality regulations, the EU has accepted those programmes without a legal opposition, as shown above. Moreover, so long as the number of recipients is well managed by imposing a sufficiently high price to control the number, the impact on a national level is also limited since the buyers' residency is likely to be in other

⁵⁵ K. Kruma, 'An Ongoing Challenge: EU Citizenship, Migrant Status and Nationality (Focus on Latvia)', PhD Thesis, Lund University (Media-Tryck), Faculty of Law, 2012, pp. 58-63.

⁵⁶ Carrera, 2014, *supra* note 41, p. 31.

⁵⁷ Spiro, 2014, *supra* note 38, p. 9.

⁵⁸ Carrera, 2014, *supra* note 41, p. 25.

countries than Malta or Cyprus. Spiro further suggests that while the buyers' interest would be limited to the protection of their rights, the diplomatic protection for them will remain questionable given the unclear scope of the bargain.⁵⁹

2.4. Practical Aspects

Guild rightly underlines the paradox regarding the notion of a genuine link in the context of nationality.⁶⁰ The concept of a genuine link may help determine who can be loyal to a state which would bestow citizenship, and who can become a societal and economic participant in the polity, rather than switch allegiance to another society and state. Conversely, the sole deference to a state's competence and emphasis on a genuine link in citizenship regulations can lead the government to misuse this competence in order to exclude certain groups of people, which will raise a discrimination issue. Therefore, among the criticisms against such a type of citizenship schemes, the argument of a genuine link is pregnable given the room for abuse.

Therefore, in addition to examining the schemes with theoretical approaches, it may need to divert the angle to justifying citizenship-by-investment schemes on economic grounds. This is because the introduction of the schemes is motivated by the need of foreign capital due to the chronic lack of domestic resources. This signifies that practical necessity underlies the citizenship-by-investment schemes. Although globalisation has contributed to bringing about a paradigm shift in the realm of citizenship and nationality with the idea that citizenship can be in the category of commodity,⁶¹ the emergence of citizenship-by-investment schemes does not solely stem from such a shift. Instead, citizenship-by-investment schemes originated from a pragmatic approach. Despite restructuring of economic policies such as privatisation and conclusion of trade and investment agreements with other countries, many countries failed to attract sufficient economic resources so as to innovate their strategic industries, diversify industries and foster economic development.⁶² This tendency becomes more evident in the case of developing countries which are heavily reliant on

⁵⁹ Ibid.

⁶⁰ Guild, 2004, *supra* note 26, pp. 68-81.

⁶¹ Džankić, 2015, *supra* note 2, p. 20.

⁶² S. Lall and R. Narula, 'Foreign Direct Investment and its Role in Economic Development: Do we Need a New Agenda?', *The European Journal of Development Research*, vol. 16, no. 3, 2004, p. 447.

one main industry, especially an agricultural sector. Moreover, the financial crisis left many countries with deteriorated financial system, which has not fully recovered. Among countries severely damaged by the financial crisis, the ones heavily reliant on foreign investment and specific volatile industries found it more difficult to recover from the crisis.

Most of the citizenship-by-investment schemes have the tendency of requiring foreign investors to make a contribution to national fund foundations. Those funds are used to protect public interest and develop infrastructure, including enhancement of education, research and development, innovation, employment plans, the environment and public health.⁶³ In addition to the national funds, some citizenship-by-investment initiatives require applicants to make an investment in government stocks, bonds and debentures with aiming at financial recovery. Although the types of investment or government bonds/funds will differ depending on the country, the funds for the sake of public interest and infrastructure and investment in government bonds are imperative for economic development and recovery from the economic and financial crisis. Therefore, the approach which only focuses on the theoretical legitimacy underlining a genuine link will lead to overlooking the practical benefits of foreign capital to host states.

However, one of the leading practical reasons why this type of schemes is criticised is due to national security concerns. There has always been security concern regarding granting citizenship to foreigners. Particularly, citizenship-by-investment schemes create not only domestic national security concerns, but also potential national security risks to other countries. While national security issues exist in this context, the programmes may have been built on the premise that a wealthy foreign investor who undergoes a due diligence process is less likely to be a threat to national security. Yet, even after a due diligence process, the possibility of a naturalised person becoming a threat to national security still remains. Once applicants become naturalised, they shall be treated in the same way as other citizens. Such equal treatment is important to provide security and assurance for the status of citizenship given under such a programme and to prevent any room for arbitrary measures. However, citizens

⁶³ Article 13 of L.N. 47 of 2014, Maltese Citizenship Act (CAP.188), Individual Investor Programme of the Republic of Malta Regulations, 2014 (hereinafter Maltese Citizenship Act).

naturalised under the programmes are subjected to more scrutiny on account of a potential shift in diplomatic relations and the possibility of illicit financial activities depending on future circumstance. Moreover, countries, especially the US and Canada, are concerned about the visa-free travelling agreement which allows nationals to travel to other contracting countries without a visa. This security concern is augmented in the case of EU Member States. To understand a potential security concern which can be caused by a citizenship-by-investment scheme, the following section will examine national security in citizenship-by-investment schemes.

3. Immigration Schemes for Individual Foreign Investors and National Security

Many countries have denounced citizenship-by-investment schemes on the basis that the schemes can adversely affect not only domestic national security but also national security of other states. Moreover, where a host state is an EU Member State, the potential risk can increase dramatically in parallel to the benefits which a naturalised citizen under the scheme can enjoy. This section firstly undertakes an examination of citizenship-by-investment schemes on a country-by-country basis. It will discuss the following countries: Caribbean Islands, including St. Kitts and Nevis and Antigua and Barbuda, and the European countries of Malta, Cyprus, Bulgaria, Romania and Ireland. The next section discusses the Canadian and the US permanent residence schemes and compares them with citizenship-by-investment schemes; the Canadian permanent residence scheme for foreign investors was abolished in 2014.

3.1. Caribbean Islands

3.1.1. St. Kitts and Nevis

St. Kitts and Nevis, a dual-island state in the Caribbean Sea, is the first country to implement a citizenship-by-investment scheme without requiring a history of previous residence as of 1984.⁶⁴ The scheme requires a clean criminal record, comprehensive CV, business background and either donation for the Sugar Industry Diversification Foundation (SIDF) or investment in the real estate industry development designated

⁶⁴ Part II, Section 3 (5) of the Citizenship Act, 1984.

by the government of St. Kitts and Nevis.⁶⁵ To apply for citizenship by contributions to the SIDF, a single applicant shall donate US \$250,000.⁶⁶ Applicants for the investment option shall invest at least US\$ 400,000 in the real estate industry which shall not be sold for 5 years after the purchase, in addition to government fees of US\$ 50,000 for a single applicant.⁶⁷

Regarding deprivation, the Citizenship Act of St. Kitts and Nevis stipulates that if an applicant is found to have provided false information or concealed material facts, the applicant may be deprived of citizenship under Part III, Section 8(a) of the Citizenship Act. The only appearance of national security can be found in the ineligibility qualifications, which states that an applicant shall not be approved for citizenship under the programme if the applicant is a potential national security risk to St. Kitts and Nevis or to any other country. Yet, the scheme does not provide more information to help interpret the scope and the meaning of “a potential national security threat”. This is on the list of due diligence checks for an applicant’s background for which an applicant shall not be approved for citizenship-by-investment.⁶⁸ This is why a thorough, objective and transparent due diligence background check is imperative in order to gain the reputation that passport holders of St. Kitts and Nevis are not potential national security threats to other countries. Simultaneously, with the aim of mitigating the possibility of arbitrary manoeuvre, it may be necessary to grasp the meaning of potential national security to St. Kitts and Nevis and any other country in this context.

Osmond Petty, Permanent Secretary in the Ministry of National Security, stated that the national security policy of St. Kitts and Nevis focused on implementation against

⁶⁵ AMF Global, ‘St. Kitts and Nevis, Citizenship by Investments’, 2012, <http://amf-global.com/wp-content/uploads/2012/12/AMF-BROCHURE-EML.pdf> (accessed May 4, 2018), pp. 5-7.

⁶⁶ An applicant with up to three dependants (one spouse and two children below the age of 18) shall pay US\$300,000; an applicant with up to 5 dependants pays US\$350,000; an applicant up to 7 dependants pays US\$ 450,000. For additional contribution for each unmarried dependant from 18 to 25 years old - due diligence authority fees are not included.

⁶⁷ US\$ 25,000 for each additional dependant such as a spouse of the main applicant and a child below the age of 18; a dependent apart from spouse whose age is over 18 shall pay US\$ 50,000 for government fees - due diligence authority fees are not included.

⁶⁸ Article 7(2) Due Diligence Checks provides that “an applicant who (a) has provided false information on his/her application form; (b) has a criminal record; (c) is the subject of a criminal investigation; (d) is a potential national security risk to St. Kitts and Nevis or to any other country; (e) is involved in any activity likely to cause disrepute to the Federation of St. Kitts and Nevis; or (f) has been denied an entry visa by a country with whom citizens of St. Kitts and Nevis have visa free entry shall not be approved for Citizenship by Investment”. This type of eligibility list can be found in other countries’ citizenship schemes for foreign investors.

crime at domestic level and international level.⁶⁹ Given that the eradication of domestic crimes is regarded as a priority to deal with as threats to national security, other aspects of security such as economic security and political security are overlooked in this case. Although Prime Minister Timothy Harris underlined that his administration took a comprehensive approach to national security,⁷⁰ the scope of national security does not seem sufficiently broad to include other security issues in the Citizenship Act. Furthermore, given that Prime Minister Harris noted “at this time [that] the issue of crime fighting is of paramount importance to our Unity government”, it can be understood that his understanding is based on the premise that security issues arise mainly from criminal threats.

Although the scope of national security at the domestic level is narrow, the range of potential threats to national security of other countries tends to be contingent on international order and diplomatic relations with other countries. Even though the government of St. Kitts and Nevis announced in July 2013 that nationals from Iran and Afghanistan were no longer eligible to participate in the programme,⁷¹ it was claimed, by Financial Crimes Enforcement Network (FinCEN), US Department of the Treasury, that Iranian applicants still receive citizenship through the programme.⁷² The advisory report issued by the FinCEN underlines that certain foreigners had acquired citizenship of St. Kitts and Nevis through the programme in order to evade international economic sanctions against them or to get involved in illicit financial activities.⁷³ The report further criticises the programme on account of its slack controls and alerted financial institutions to undertake risk-based due diligence by highlighting the risk which can stem from the weak controls.

⁶⁹ ‘St. Kitts-Nevis Government Strengthens National Security’, *Caribbean News Now*, June 5, 2015, <http://www.caribbeannewsnow.com/topstory-St-Kitts-Nevis-government-strengthens-national-security-26407.html> (accessed May 4, 2018).

⁷⁰ Ibid.

⁷¹ St. Kitts & Nevis Citizenship by Investment, ‘Are There any Restrictions on Who Can Apply?’, <http://stkitts-citizenship.com/faqs/> (accessed May 4, 2018).

⁷² US Department of Treasury, ‘Advisory Report on Abuse of the Citizenship-by-Investment Program Sponsored by the Federation of St. Kitts and Nevis, *Financial Crimes Enforcement Network*, FIN-2014-A004, May 20, 2014.

⁷³ Ibid.

According to Prime Minister Harris, at the end of 2015, 10,777 applicants, most of whom are Chinese, Russians and Middle Easterners,⁷⁴ were given citizenship under the citizenship-by-investment scheme.⁷⁵ Also, the number of passports issued has demonstrated an increasing trend.⁷⁶ Although it is claimed that through the attempts to restructure the citizenship-by-investment programme, the transparency has been enhanced, the importance of control on the number of passports issued under the programme should not be overlooked since the government is not recommended to accept applicants more than they can control, especially where the programme is criticised for its lax controls.

3.1.2. Antigua and Barbuda⁷⁷

Given the success of St. Kitts and Nevis regarding attracting foreign capital, Antigua and Barbuda introduced the ‘Citizenship by Investment Programme’ in 2013. The Antigua and Barbuda programme offers three options⁷⁸ on condition that an applicant has a clean criminal record and undergoes background checks. The options consist of a non-refundable contribution of at least US\$ 250,000 to the National Development Fund (NDF), an investment of a minimum of US\$ 400,000 in the approved real estate projects which shall be held for 5 years at a minimum or an investment of US\$ 1,500,000 directly to a business as a sole investor or a joint investment of a minimum of US\$ 5,000,000 engaging at least 2 individuals in an eligible business.⁷⁹

Similar to the St. Kitts and Nevis scheme, an applicant who provides false information, has a criminal record,⁸⁰ or has been denied a visa to a country with which Antigua and Barbuda has a visa-free travel agreement and not subsequently obtained a visa to the country concerned will be ineligible for the scheme.⁸¹ In addition, an application will

⁷⁴ J. Clenfield, ‘This Swiss Lawyer is Helping Governments Get Rich off Selling Passports’, *Bloomberg*, March 11, 2015, <http://www.bloomberg.com/news/articles/2015-03-11/passport-king-christian-kalin-helps-nations-sell-citizenship> (accessed May 4, 2018).

⁷⁵ ‘High-end Property Buyers Rush in to Saint Kitts and Nevis’, *Global Property Guide*, March 20, 2016, <http://www.globalpropertyguide.com/Caribbean/St-Kitts-and-Nevis/Price-History> (accessed May 4, 2018).

⁷⁶ In 2005, 6 passports were issued under the citizenship programme ; in 2006, 19 passports were issued; in 2007, 75 were issued; 202, 292, 664, 1092, 1758, 2044, 2329 and 2296 passports were issued in the year of 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015, respectively.

⁷⁷ Antigua and Barbuda Citizenship by Investment Act, 2013, No.2 of 2013; Antigua and Barbuda Citizenship by Investment, <http://www.antiguabarbuda-citizenship.com/> (accessed May 4, 2018).

⁷⁸ All three options are subject to government and due diligence authority fees.

⁷⁹ Each of the individuals involved in the joint investment shall invest US\$ 400,000 at a minimum.

⁸⁰ Even an applicant subject to criminal investigation will be denied.

⁸¹ See further, Džankić, 2015, *supra* note 2, pp. 6-8.

be denied if an applicant is a potential risk to national security to Antigua and Barbuda or any other country. The programme does not accept any application from some countries including Afghanistan, Iran, Iraq, North Korea, Somalia and Yemen.⁸² When it comes to the ineligible nationality list, in comparison to St. Kitts and Nevis, the Antigua and Barbuda Citizenship Act is more restrictive.

Citizenship given under the Citizenship Act can be withdrawn if a naturalised citizen does not spend at least 35 days in Antigua and Barbuda for 5 years after obtaining citizenship with no repayment of any investment or contribution. Moreover, according to section 8 of the Citizenship Act regarding citizenship by registration, it is possible to deprive a person of citizenship after conferring it⁸³ on the grounds that the citizenship was obtained based on false information or wilful concealment of material facts or the person has been convicted of an act of treason or sedition against Antigua and Barbuda.⁸⁴

Compared to the St. Kitts and Nevis programme, Antigua and Barbuda has not received direct criticisms in relation to its programme nor come under scrutiny by the US. Whereas St. Kitts and Nevis provides two options for donation or investment, Antigua and Barbuda permits application for the direct investment option in addition to real estate investment. Regarding nationals of the countries which are ineligible, Antigua and Barbuda provides a longer list than St. Kitts and Nevis. This suggests that Antigua and Barbuda takes international sanctions into consideration for its citizenship scheme in order to prevent international criticisms on national security grounds. Notwithstanding, there is no public report on cases of revocation on the grounds of national security.

3.2 European Countries

One of the implications of an EU Member State granting citizenship to a foreigner is that the foreigner will be, by extension, entitled to EU citizenship, consequently affecting the rest of the EU Member States. Before Malta's initial draft of its

⁸² If a national of one of those countries has obtained permanent residence permits from Canada, the United States and Western Europe, applications will be considered.

⁸³ Section 4. Deprivation of Citizenship by Investment of Antigua and Barbuda Citizenship by Investment Act, 2013.

⁸⁴ The person shall have a right of appeal to the High Court.

citizenship-by-investment scheme, there was no such strong opposition within the EU regarding the nationality laws of EU Member States. Opposition to the draft scheme from the EU institutions and the other EU Member States might have arisen from a variety of reasons: firstly, no requirement for prior residence in Malta; secondly, the financial requirement for the application was lower than other countries' for similar schemes.⁸⁵

3.2.1. Malta

At first, the Maltese Individual Investor Programme (IIP) was proposed to provide citizenship to those who make a financial contribution to the government and investment, without requiring prior residency in the country. In other words, the crucial requirement for gaining citizenship was the economic status of an individual. The proposal was amended after the European Commission suggested Malta add a condition of residence for at least 12 months in the citizenship scheme.⁸⁶ Hence, in addition to an adjustment on the financial requirement, Malta added the residency requirement of a minimum of 12 months⁸⁷ in the IIP. Therefore, from the Maltese point of view, the EU membership can be both opportunities for and constraints to the investor scheme.

The amended L.N. 47 of 2014, *Maltese Citizenship Act* (CAP.188) and the Individual Investor Programme of the Republic of Malta Regulations 2014 state that for an applicant to be bestowed citizenship under the programme, he/she shall make a minimum contribution of €650,000 to the National Development and Social Fund⁸⁸ in addition to payment of due diligence fees of €7,500 for main applicant.⁸⁹ The applicant shall retain a residence for at least 5 years, either by purchasing a property of which value exceeds €350,000 or by leasing a property of which annual rent exceeds €16,000.

⁸⁵ For instance, Cyprus requires €2.5 million at a minimum in the case of Major Collective Investment, while the total financial contribution for Maltese citizenship is approx. €1 million, including donation, government bonds and real estate

⁸⁶ The EU Commission's intervention per se could be subject to interesting analysis. If such intervention is considered permissible, the dynamic between Member States and the EU institutions regarding regulations in nationality can be subject to modification or challenge since in the past, the autonomy of Member States on the field was deemed exclusive.

⁸⁷ Yet, the residence condition requires an applicant to reside for 12 months before his/her passport is issued. Thus, technically applicants need not reside for 12 months in order to apply for citizenship.

⁸⁸ The amount of a contribution for spouse and children under the age of 18 is €25,000 each; the amount for dependent children from 18 to 26 years or dependent parents above 55 years is €50,000.

⁸⁹ The amount of due diligence fees for spouses and adult dependants (children and parents) is €5,000; the amount for children 13 to 18 years is €3,000 each.

The main applicant also shall invest €150,000 at a minimum in financial instruments approved by the government, such as stocks, bonds, debentures and must retain the investment for at least 5 years.

The Citizenship Act specifies qualifications, general requirements and eligibility criteria. Article 5 stipulates eligibility criteria regarding legal background. Among the eligibility criteria, Article 5(e) states that “the applicant and, or any of his dependants is not, or may not be a potential threat to national security, public policy or public health.” While other eligibility criteria are clear in that they explicitly referred to criminal records in terrorism, money laundering, or other sexual assaults, the criterion as regards national security, public policy or public health is not sufficiently illustrative. Two other provisions: Article 6 (ineligible applicants) and Article 10 (deprivation of citizenship refer to national security. Article 6 provides the types of applicants who shall not be approved for citizenship unless the authority in charge – Identity Malta – issues approval for their special circumstances. One of the ineligibility criteria is the case in which an applicant is “a potential national security threat to Malta”. Analogous to Article 5, the other sections of Article 6 are self-evident while the meaning of a potential national security threat is obscure. Although it is not specified in the Citizenship Act, Identity Malta lists nationalities which are ineligible for citizenship under the programme: the Islamic Republic of Afghanistan, the Islamic Republic of Iran and the Democratic People’s Republic of Korea (North Korea) or non-nationals who reside, do business, or have significant connections to these countries.⁹⁰ This list shows that Malta attempts to mitigate security risks posed by the programme by explicitly excluding countries subject to international sanctions.

Article 10 specifies the discretion for the Minister to deprive a person of her/his Maltese citizenship given under the IIP in the case where an applicant breaches any requirement to retain an immovable property in Malta or to keep investment in Malta for at least 5 years, or where an applicant has become a threat to national security or became involved in activities which negatively affects the vital interests of Malta. In the case of revocation, the Minister shall observe the grounds explicitly stated by law and shall not apply an arbitrary decision for revocation such as *en masse* targeting

⁹⁰ Malta Individual Investor Programme, ‘Eligibility’, <http://iip.gov.mt/faqs/> (accessed May 4, 2018).

citizens under the IIP since once a person is given Maltese citizenship, he/she will be treated as any other Maltese national.⁹¹ Although the scope of national security hereto is not delineated, as an EU Member State, the understanding of security, public policy and public health should be read in conjunction with EU policy.⁹²

At the domestic level, Chetcuti Cauchi Advocates restated the grounds for revocation of Malta IIP. It stated, if citizenship was acquired by providing false material or if the citizen has demonstrated “disloyal speech or act towards the Government and the President of Malta” or the citizen was involved or associated in an enemy or with any business which is intended to assist an enemy.⁹³ The explanation on deprivation of citizenship based on national security by Chetcuti Cauchi Advocates mainly focuses on military and diplomatic security disregarding other types of security. The grounds of deprivation were classified by Legal Malta into two main categories: the first category is the ground which a person was not entitled to the acquisition of nationality from the beginning whereas the second category is the grounds of a person’s conduct after the acquisition of the citizenship since the conduct is not in compliance with public interest and national security, thereby disqualifying the citizenship.⁹⁴

As a result, 578 applications were made from more than 40 countries⁹⁵ in 2015 under the IIP, and 476 out of 578 applicants had submitted all the necessary documents for application. However, only 54 applicants have been granted citizenship by March 2016⁹⁶ out of the cap of 1800 approved applications. Compared to the number of applications, the approved applications are few. The regulatory cap, the criticisms and concerns raised by the EU institutions may explain why Malta applied a stringent rule during the due diligence process.

⁹¹ Legal Malta, ‘Revocation of Maltese Citizenship under Maltese Law’, December 14, 2014, <http://www.legal-malta.com/articles/revocation-of-maltese-citizenship-under-maltese-la> (accessed May 4, 2018)

⁹² As mentioned in the previous chapter, currently the EU understands the concept of public security focusing on military security and border security against illegal immigrants.

⁹³ Chetcuti Cauchi, ‘Malta Citizenship by Investment’, Feb 27, 2016, <http://www.ccmalta.com/publications/malta-citizenship-investment> (accessed May 4, 2018).

⁹⁴ Legal Malta, *supra* note 94.

⁹⁵ Chetcuti Cauchi, 2016, *supra* note 85.

⁹⁶ ‘578 Applied for Citizenship by Investment Last Year - 54 Already Awarded Citizenship’, *Times of Malta*, March 8, 2016, <http://www.timesofmalta.com/articles/view/20160308/local/578-applied-for-citizenship-by-investment-last-year-54-already-awarded.605048> (accessed December 12, 2017).

3.2.2. Cyprus

To mitigate the effects arising out of its economic crisis, the Council of Ministers of Cyprus, on 19 March 2014, revised the “Scheme for Naturalisation of non-Cypriot investors by exception.”⁹⁷ This amendment specified a new financial criteria. The options are:

- (i) investment in government bonds (€5 million);
- (ii) investment in financial assets of Cypriot companies or Cypriot organisations such as bonds, securities, debentures issues in Cyprus (€5 million);
- (iii) a bank deposit (€5 million deposited for 3-year fixed-term in a bank in Cyprus);
- (iv) direct investment (€5 million of purchases or construction of real estate, acquisition of a local business,⁹⁸ purchase of shares of companies or financial assets, and/or participation in a company undertaking a public project);
- (v) combined investments of aforementioned criteria (€5 million);
- (vi) special class of those whose bank deposits in the Bank of Cyprus and the Popular Bank Public Company were damaged by the Cypriot government Decree of 15.3.2013 and whose impairments are tantamount to at least €3 million; or
- (vii) major collective investment which reduces the amount of investment to €2.5 million where the total value of the collective investment is at least €12.5 million.

An applicant must retain the investment for no less than a period of 3 years after citizenship is granted. In addition to the investment, an applicant must purchase an immovable property for the residence of which value exceeds €500,000.

In contrast with the Maltese scheme, the Cypriot scheme does not specify the case of deprivation, nor national security concerns in the decree, nor specific nationality

⁹⁷ Council of Ministers Decision on ‘Scheme for Naturalisation of Investors in Cyprus by Exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002-2013 (hereinafter Council of Ministers Decision), September 13, 2016.

⁹⁸ The businesses or companies should employ at least 5 Cypriot citizens.

restrictions. Instead, the Chapeau of the Cypriot scheme states that “in the case where, following a periodic inspection, it has been ascertained that any condition is being circumvented, the Naturalisation may be revoked”.⁹⁹ In other words, the scheme enables the Cypriot Authority to undertake periodic checks, in order to determine if applicants are fulfilling the conditions and to deprive them of citizenship where they breach the conditions.¹⁰⁰

Apart from applicants breaching the conditions, Cypriot citizenship has been revoked on the grounds of international sanctions. The wealthy investor, Rami Makhlouf, a relative of the Syrian President Bashar al-Assad received Cypriot citizenship on 4 January 2011. Four months later, the EU imposed sanctions on Makhlouf for his involvement in the Syrian political authoritarian regime, whereby his Cypriot citizenship was revoked.¹⁰¹ This showed Cyprus’s discretion to deprive a naturalised person of citizenship based on international pressure beyond national security within the border. However, despite the discretion of the authority to withdraw citizenship based on B.3 Terms and Conditions of the scheme, the insufficient procedural and substantive explanation on the deprivation of citizenship under the programme can create room for arbitrary decisions by the authority.

Like other schemes, the Cypriot programme requires a clean criminal record, a residence in Cyprus, and relevant documents of investment. Unlike the Maltese scheme, the Cypriot scheme does not require prior residency but has managed to avoid official intervention by the EU institutions. Therefore, from the perspective of a foreign investor, the Cypriot scheme can be more attractive although the total required investment for the Cypriot scheme is higher than the Maltese.

The programme had drawn €2.5 billion in revenues between 2013 and 2015.¹⁰² Nevertheless, the Interior Minister Socratis Hasikos has refused to reveal the number

⁹⁹ Council of Ministers Decision, *supra* note 89.

¹⁰⁰ Džankić, 2015, *supra* note 2, p. 9.

¹⁰¹ S. Farolfi, D. Pegg and S. Orphanides, ‘Cyprus ‘Selling’ EU Citizenship to Super Rich of Russia and Ukraine’, *The Guardian*, September 17, 2017, <https://www.theguardian.com/world/2017/sep/17/cyprus-selling-eu-citizenship-to-super-rich-of-russia-and-ukraine> (accessed December 12, 2017).

¹⁰² A. Anastasiou, ‘Citizenship-by-investment Raises €2.5bn for Cyprus’, *Cyprus Mail*, November 6, 2015, <http://cyprus-mail.com/2015/11/06/citizenship-by-investment-raises-e2-5bn-for-cyprus/> (accessed December 12, 2017).

of foreign investors who were granted citizenship under the programme.¹⁰³ Though the EU has weighed significant pressure on Cyprus to make an amendment to the eligibility conditions in the citizenship scheme.¹⁰⁴ Cyprus countered the pressure by positing that the programme was a temporary measure to soothe its devastating economic situation arising from the financial crisis. However, the programme has continued in effect.¹⁰⁵ This may provide the possible explanation why Cyprus has avoided public intervention by the EU institutions. While the EU passport is at stake, the Cypriot government has resisted including a requirement of prior residence. From the EU's point of view, the scheme should be implemented as a temporary emergency measure because it includes those whose deposits were impaired by the Cypriot government measures in 2013 caused by the financial crisis. However, since the phase of drafting a proposal passed, the EU institutions cannot easily intervene in the current existential legislation on nationality after it began implementing.

3.2.3. Bulgaria and Romania

Unlike Malta and Cyprus, the citizenship-by-investment programmes in Bulgaria and Romania require applicants to have an efficient residence history. Džankić suggests a comparison citizenship schemes of Romania and Bulgaria.¹⁰⁶ She explains that they are “hybrid” insofar as they require applicants to have permanent residence rights before proceeding to application. To apply for citizenship-by-investment, it is a prerequisite to hold a permanent residence permit.

Regarding Bulgaria, Part 6 of Article 25¹⁰⁷ of the Law for Foreigners (LF) in the Republic of Bulgaria¹⁰⁸ provides that a foreign investor can gain a permanent residence permit if the investor has invested 1 million Bulgarian lev/BGN (approx.. €0.52 million) in Bulgarian trade companies with tradable shares,¹⁰⁹ state bonds, ownership of more than 50% of a Bulgarian business, intellectual property and trademark, or rights to concession in Bulgaria. As an alternative, according to Article 25c of the LF, a foreign investor can apply for permanent residency if the investor has invested in a

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ And the Scheme does not contain a sunset clause.

¹⁰⁶ Džankić, 2015, *supra* note 2, p. 12.

¹⁰⁷ Previous Article 25, SG. No. 36/2009.

¹⁰⁸ Law for Foreigners in the Republic of Bulgaria (Official Gazette 29/6 April 2007).

¹⁰⁹ Article 25 (para 1, part 8) stipulates that if the shares are not tradable in the market, the amount of investment should be at least 6 million Bulgarian leva (€3.12 million).

class A project which includes projects in the field with high unemployment or in the high technology sector (with approx. the amount of €8.18 million investment), high technology projects in service sectors (€5.6 million) or regular projects (€16.3 million) in conjunction with the Investment Promotion Act. Once foreign investors have held permanent residency under Article 25 or Article 25c of the LF, for five years, they become entitled to apply for Bulgarian citizenship according to Article 12 of the Bulgarian Citizenship Act which specifies that individuals with a residence permit can apply for naturalisation.¹¹⁰ The other criteria required for the application are that an applicant should be at least 18 years and should not have been convicted of a wilful crime by a Bulgarian court.

In addition to this option, Bulgaria introduced a new fast-track option to citizenship in 2013,¹¹¹ which requires doubling investment. Thus, making two investments which is tantamount to 2 million BGN in total. In exchange, the minimum duration for which an applicant must hold a permanent residence permit decreases to one year. In other words, applicants to the fast-track citizenship are required to have at least one year of permanent residence status in exchange of double the investment whereas applicants for the regular Bulgarian Citizenship Act are required to have a permanent residence permit at least for 5 years. This shows that even if a foreign investor increases the amount of investment, Bulgaria still underlines the importance of prior connection and past commitment by foreign investors. In this sense, the citizenship-by-investment scheme of Bulgaria differs from the Cypriot and Maltese ones.

The LF provides rationales for revocation of residence rights for a foreigner on the grounds of national security and public interest,¹¹² but there are no revocation clauses for a naturalised individual on the basis of national security. Instead, in case that a naturalised person is sentenced for committing a serious crime, the person can be

¹¹⁰ Section III. Acquisition of Bulgarian Citizenship through Naturalisation, Article 12 of the Bulgarian Citizenship Act.

¹¹¹ Article 14a of the Bulgarian Citizenship Act.

¹¹² Article 33h. (4) (New - SG, No 23/2013, in force as of 01.05.2013) of the LF. A foreigner, possessing a residence permit of a long-term resident in the European Union in the first Member State on the basis of an international protection granted by this Member State, which has not been taken away, may be expelled from the country prior receiving his or her long-term residence in the Republic of Bulgaria permit, if there are grounds for considering that he or she poses a serious threat to the national security, or who, as a convict with a serious crime sentence entered into effect, poses a threat to the public order.

deprived of the citizenship. Section III (Deprivation of Bulgarian citizenship) of LF states that:

A person who has acquired Bulgarian citizenship by way of naturalisation can be deprived of it, if he is convicted by enacted sentence for a severe crime¹¹³ against the republic, on condition that he is abroad and does not remain without citizenship.¹¹⁴

The Romanian scheme is different from the Bulgarian one. Article 8 of the Romanian Citizenship Act decreases the length of the ordinary residence requirement from 8 to 4 years with the proviso that an applicant must have invested €1 million in Romania.¹¹⁵ In addition to the residence and investment conditions, the Romanian Act requires the applicant to fulfil other criteria including age, the ability for a decent living, a non-criminal conviction in any countries, language and culture, allegiance to Romania, and knowledge of the Romanian Constitution and national anthem.¹¹⁶

There is no particular clause for revocation under this special scheme, but the general clause applies to all naturalised citizen irrespective of the type of scheme. Article 25 of the Romanian Act stipulates

The Romanian citizenship may be withdrawn from the person who:

- a) found abroad, commits very serious offences which injure the interests of the Romanian state or its authoritativeness;
- b) found abroad, enlists in the armed forces of a state with which Romania has broken the diplomatic relations or with which is in state of war;
- c) has obtained the Romanian citizenship by fraudulent means; or

¹¹³ It does not illustrate the types of severe crimes.

¹¹⁴ Chapter 3 Losing Bulgarian Citizenship, Section III Deprivation of Bulgarian citizenship of LF. See further G. Georgieva, 'Acquiring Bulgarian Citizenship by a Foreign National', March 13, 2015, <http://www.ruskov-law.eu/bulgaria/article/bulgarian-citizenship-foreign-national.html> (accessed December 14, 2017).

¹¹⁵ Article 8, para 2 stipulates that "the time-limits laid down in paragraph 1 (a) may be reduced until half in the following situations: [...] (d) the applicant has invested in Romania amounts exceeding 1,000,000 Euro."

¹¹⁶ Article 8, para 1 of Romanian Citizenship Act.

d) is known as having connections with terrorist groups or has supported, under any form, or has committed other actions which endanger the national security.¹¹⁷

However, a Romanian citizen who has acquired citizenship by birth will not be deprived of citizenship even if the person commits very serious offence injuring the interests of Romania. This implies that a naturalised citizen is subject to less benevolent standards for revocation of citizenship than a citizen who has gained citizenship by birth.

The comparative analysis of the schemes of European countries in force shows that countries have different expectations regarding “a genuine link” and level of loyalty from foreign investors who wish to be naturalised although all of the schemes aim to provide more favourable conditions for foreign investors who invest a significant amount of money.

3.2.4. Ireland

Ireland has abolished its citizenship-by-investment scheme. However, the restructuring of the programme and the reason why the programme came to an end are noteworthy for the future development of other citizenship-by-investment schemes.

Ireland implemented a citizenship-by-investment programme from 1989 to 1998. The Irish Nationality and Citizenship Act 1956 was amended to incorporate the programme, by waiving the provision of section 15(c)¹¹⁸ of the Irish Act so that foreigners who establish particular businesses, particularly in the manufacturing sector, could be exempt from the normal residence requirement. Section 16 of the Irish Act stipulates that although the conditions for naturalisation specified in section 15 are not fulfilled, the Minister, in his absolute discretion, can approve an application for citizenship where the applicant is Irish associations.¹¹⁹ According to the Statement of

¹¹⁷ Chapter 5. Losing the Romanian Citizenship of the Law no.21 of March 1, 1991.

¹¹⁸ Section 15(c) of the Act provides that the Minister may grant the application, if satisfied that the applicant has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period, has had a total residence in the State amounting to four years.

¹¹⁹ Section 16 comprises seven subsections: in cases that the applicant is (a) of Irish decent or Irish associations; (b) a parent or guardian on behalf of a minor of Irish decent or Irish associations; (c) a naturalised Irish citizen acting on behalf of a minor child of the applicant; (d) married to a naturalised

Intent, the Minister would regard the following type of applications as meeting the conditions of “Irish associations” under section 16(a) of the Irish Nationality and Citizenship Act, and waive the residency requirement specified in section 15(c) of the Act if:

- (a) the applicant acquired a residence in the state, had been resident for two years and spent a reasonable amount of time in the State over the two years;
- (b) the Minister was satisfied [...] that the applicant had established a manufacturing or international services or other acceptable wealth and job-creating project here that was viable and involved a substantial investment by the applicant.¹²⁰

The Statement of Intent also stipulated that the applicant is required to have acquired a residence and have spent at least 60 days in Ireland over the past two years. Despite the initial intention of attracting investment in the manufacturing industry through the scheme, investments in the forestry and shipping industries were also included in the list of approved industries.¹²¹ Although no minimum amount of investment was provided, investment of £500,000 was considered as the norm.

The government decided in March 1992 that “Irish associations” should not be interpreted to limit the condition to invest in industry, whereby projects pertaining to tourism were included. Between 1988 and 1994, 66 investors and 39 spouses and children were naturalised through the scheme. It was revealed that some successful applications of naturalisation did not satisfy the requirements under the Irish Act or evidence was missing from the files. This revelation led to highlighting the necessity of a more transparent approach. Hence new guidelines in 1994 which introduced the Terms of Reference of an Advisory Group on Investment-linked Naturalisation so that the Group could examine each application by making recommendations on criteria including property ownership and investment conditions.¹²²

Irish citizen; (e) married to an Irish citizen; (f) has been resident abroad in the public service; (g) a refugee.

¹²⁰ Irish Naturalisation and Immigration Service, ‘Report by Review Group on Investment-based Naturalisation’, April 2000. Appendix A. Statement of Intent.

¹²¹ Ibid para 2.5.

¹²² J. Handoll, ‘Country Report: Ireland’, *EUDO Citizenship Observatory*, EUI RSCAS, no. 2010/22, September 2009, revised June 2010, p. 5.

Whereas the pre-1994 scheme required the investor to fulfil the condition of good faith to continue to reside in the state following naturalisation, the scheme after 1994 only required the investor to reside for 60 days at least in the two years after being granted citizenship. In the period from 1994, until the programme was abolished, 40 investors and their 24 spouses and children were naturalised. In 1996, the government decided not to accept new applications. Consequently, in 1998, the scheme was abolished. In total, 169 persons including the investors' 63 spouses and children were naturalised under the programme with a total investment of over £100 million.

The main reason that the Irish programme came to an end is that despite introducing the new guidelines, the issues of transparency and informality still existed and it was assessed as lacking extra safeguarding tools. This means that with the aim of efficient and sustainable implementation of such a scheme, transparency and due diligence should be undertaken by governmental authorities in charge in order to diminish the risks of misuse of the scheme.

Country /Enabling Law	Residence requirement	Types of investment or donation	Appearance of national security	Other requirements
St. Kitts and Nevis ► Part II, Section 3 (5) of the Citizenship Act, 1984	No	<ul style="list-style-type: none"> • Donation for the SIDF (US \$250,000) or • Investment in the real estate industry development (US\$400,000) 	Ineligibility qualification (i.e. if an applicant is a potential threat to national security, the applicant is ineligible to apply)	<ul style="list-style-type: none"> • Clean criminal record • CV • Business background
Antigua and Barbuda ► Citizenship by Investment Act, 2013, No.2 of 2013	No	<ul style="list-style-type: none"> • Non-refundable contribution to the NDF (US\$250,000) or • Investment in approved real estate projects (US\$400,000) 	Ineligibility qualification	<ul style="list-style-type: none"> • Clean criminal record • Background checks

		<ul style="list-style-type: none"> or • Direct Investment (US\$1,500,000) or joint investment (US\$5,000,000) in an eligible business 		
<p>Malta</p> <p>► L.N. 47 of 2014, Maltese Citizenship Act (CAP.188), Individual Investor Programme of the Republic of Malta Regulations, 2014</p>	<p>Yes (12months)</p>	<ul style="list-style-type: none"> • Contribution to National Development and Social Fund (€650,000) AND • Investment in approved financial instruments (€150,000) 	<ul style="list-style-type: none"> • Eligibility criteria • Ineligible applicants • Deprivation of citizenship 	<ul style="list-style-type: none"> • Residence either by purchasing a property (€350,000) or by leasing (annual rent €16,000) • Clean criminal record
<p>Cyprus</p> <p>► Scheme for Naturalisation of non-Cypriot investors by an exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002-2013</p>	<p>No</p>	<ul style="list-style-type: none"> • Investment in government bonds (€5M) or • Investment in financial assets of Cypriot legal entities (€5M) or • Bank deposit (€5M) or • Direct investment (€5M) or • The combined investment of options above (€5M) 	<p>Not mentioned in the decree.</p>	<ul style="list-style-type: none"> • Clean criminal record • Purchase of property (€500,000) • Relevant documents of investment • Periodic checks after bestowing citizenship under the scheme

		<p>or</p> <ul style="list-style-type: none"> • Special class for those whose bank deposits in the Bank of Cyprus and the Popular Bank Public Company were impaired by the Decree of 15.3.2013 and whose damage amounts to €3M or • Major collective investment (sum €12.5M and €2.5M per person) 		
<p>Bulgaria</p> <p>► Part 6 of Article 25 of the Law for Foreigners (Official Gazette 29/6 April 2007 and State Gazette on February 23, 2013)</p>	<p>Yes</p> <p>(one year of permanent residency status for fast-track option, or five years in case of a regular application)</p>	<p>Investors must hold a permanent residency for 5 years (a regular application) or one year (fast-track) in order to be entitled to apply for Bulgarian citizenship.</p> <p>The requirements to gain permanent residency are as follows;</p> <ul style="list-style-type: none"> • Investment in trade companies with tradable shares; state bonds; ownership of at least 50 % of a Bulgarian business; intellectual property and trademark; or rights to 	<p>No</p> <p>(There is revocation of residency rights, but there is no revocation clause for a naturalised person on the grounds of national security.)</p>	<ul style="list-style-type: none"> • Must gain a permanent residence permit • At least, 18 years of age • Must not be sentenced by a Bulgarian court for a wilful crime

		<p>concession (BGN 1M, approx. €512,000)</p> <p>or</p> <ul style="list-style-type: none"> Investment in a class A project (€8.18M, €5.6M or €16.3M depending on the project) 		
		<ul style="list-style-type: none"> New Fast Track Option: double the investment by investing BGN 1M (€512,000) twice in government bonds or in a Bulgarian enterprise on a Priority Investment Project (investment of €512,000 and a year later another investment of €512,000) 		
<p>Romania</p> <p>► Article 8 of Romanian Citizenship Act (1991)</p>	<p>Yes</p> <p>(4 years)</p>	<ul style="list-style-type: none"> Investment of €1M (no specific industries provided) 	<p>No appearance of specific terms, but the revocation of naturalised citizenship utilises the term in connection with terrorist groups or national safety (Article 24 (d))</p>	<ul style="list-style-type: none"> 18 years of age Ability to live a decent life Clean criminal record Language and culture Allegiance to Romania Knowledge of the Constitution

				and the anthem
Ireland ► Section 16(a) of the Irish Nationality and Citizenship Act and Statement of Intent (1989-1998) (Abolished)	Yes (60 days in the past two years)	<ul style="list-style-type: none"> Investment in manufacturing, forestry and shipping industries until March 1992 and then the tourism industry was added to the list. (£500,000 - despite no suggested minimum amount of investment) 	No	<ul style="list-style-type: none"> Before 1994, good faith After 1994, the residency of 60 days in the two years after gaining citizenship

Table 3 Citizenship-by-investment programmes by country

3.3 Residence Schemes¹²³

Except for St. Kitts and Nevis, which has implemented the citizenship scheme since 1984, citizenship-by-investment programmes have a relatively recent history in comparison to residence permits for foreign investors. Compared to citizenship programmes, immigration permanent residency programmes or golden visas have a limited scope of effects. However, it is crucial to discuss potential national security concerns or economic benefits which can arise from the permanent residency programmes.

Sumption and Hooper evaluate that the permanent residency programme attracted economic benefits to the country, such as economic growth, diversification of industry and job creation.¹²⁴ The document of the US Immigrant Investor Program: New

¹²³ Although this section deals with the cases of Canada and the United States, there are many other permanent residence permit or golden visa schemes. In analysing golden residence programmes, Džankić notices a market economy by pointing out that countries such as the UK and France require a larger amount of pecuniary contribution, i.e. investment, than other countries including Romania and Bulgaria since the former are more attractive to foreign investors as investment market. See further, Džankić, 2015, *supra* note 2, pp. 18-20.

¹²⁴ Sumption and Hooper, 2014, *supra* note 1, p. 6.

American Investors Making a Difference in the Economy¹²⁵ underlines the economic impacts of the EB-5 (Employment-Based Fifth Preference) Immigrant Investor Program of the US. The paper states that the programme is different from other US citizenship and immigration services programmes to the extent that it is only a visa programme the objective of which is to create jobs and promote economic growth. It is claimed that the EB-5 played an essential role as a financing tool during the financial crisis when a conventional capital source – credit – was not available especially in Vermont and Pennsylvania. It also achieved economic diversification and modernisation in Vermont.¹²⁶

However, many countries expressed that their immigrant investor programmes have made few economic contributions, thereby considering amendments and new conditions.¹²⁷ Moreover, this has been highlighted by the UK Migration Advisory Committee, stating that residence rights were given in exchange for investment in a government-bond which do not produce economic values.¹²⁸ For this reason, Canada abolished the programme in 2014 having concluded that it did not generate sufficient economic benefits, since those investors were entitled to lower taxes and they tended to find integrating in Canada difficult, thereby leaving the country.¹²⁹ Thus, unlike citizenship-by-investment schemes which bring immediate and abundant capital flow into host states, the economic values of immigrant investor residency programmes remain questionable.

In addition to questioning some economic effects of the EB-5 programme, the Office of the Inspector General for the US Department of Homeland Security also raised a security concern.¹³⁰ Since the centres in charge of approving investment under the

¹²⁵ M. Kolodziej, 'The US Immigrant Investor Program: New American Investors Making a Difference in the Economy', *American Immigration Council*, Special Report, September 2014.

¹²⁶ Ibid.

¹²⁷ Government of Canada, 'Building a Fast and Flexible Immigration System: Government to Eliminate Backlog-Ridden and Inefficient Investor and Entrepreneur Programs', February 11, 2014, <http://news.gc.ca/web/article-en.do?nid=814939> (accessed May 4, 2018).

¹²⁸ UK Migration Advisory Committee, 'Call for Evidence: The Economic Impact of the Tier 1 (Investor) Route', October 2013, p. 5. The United Kingdom also drafted a proposal on auctioning residence, which would grant a golden residence to the highest bidders according to the report issued by Migration Advisory Committee 2014. However, due to the criticisms regarding the commodification of residence, the proposal was not adopted.

¹²⁹ Government of Canada, 2014, *supra* note 119.

¹³⁰ US Department of Homeland Security, Office of the Inspector General, DHS, 'United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center

programme in each state of the US are interested in receiving funds from foreign investors, it is claimed that they have not undertaken due diligence for investment at the proper level because there were no appropriate regulations which can control over harmful or questionable types of economic activities which can lead to impairing national security. Hence, the United States Citizenship and Immigration Services (USCIS) insisted that the institution be given the necessary authority to prevent national security threats which may harm the US given that the current legislation on the EB-5 regional centre programme does not allow for administering or managing the programme by USCIS. Conversely, it has been claimed that the programme became a risk to national security.¹³¹ For instance, it was alleged that some fraud cases stemmed from the programme and some individuals may have special connections with Chinese and Iranian intelligence or who are international fugitives accused of money laundering.¹³² This concern has been expressed by a few US politicians including Senator Charles E. Grassley, Republican of Iowa who remarked that the programme always had the potential for corruption and a threat/risk to national security.¹³³

4. Potential Repercussions and National Security Concerns

Whereas citizenship-by-investment programmes may occasion security concerns to the host state and other countries, it is noteworthy that the main prospective clients for the programmes are from China, Russia and the Middle East. Interestingly, the Chinese government by policy does not recognise dual citizenship, hence a Chinese national will lose Chinese citizenship after acquiring another citizenship. Also, under Russian policy, Russia requires her citizens to declare dual citizenship. These policies can play a role in influencing the efficiency of the schemes in the long run.¹³⁴

Program', Memorandum OIG-14-19, December 12, 2013, Appendix B. Management Comments to the Draft Report.

¹³¹ M. Mosk and B. Ross, 'Visa Program for Wealthy Foreigners Has 'Serious Security Challenges,' Homeland Whistleblower Says', *ABC News*, June 11, 2015, <http://abcnews.go.com/US/visa-program-wealthy-foreigners-security-challenges-homeland-whistleblower/story?id=31695681> (accessed May 4, 2018).

¹³² M. Chishti and F. Hipsman, 'Controversial EB-5 Immigrant Investor Program Faces Possibility of Overhaul', *Migration Policy Institute*, May 25, 2016, <http://www.migrationpolicy.org/article/controversial-eb-5-immigrant-investor-program-faces-possibility-overhaul> (accessed May 4, 2018).

¹³³ R. Nixon, 'Program That Lets Foreigners Write a Check, and Get a Visa, Draws Scrutiny', *The New York Times*, March 15, 2016, http://www.nytimes.com/2016/03/16/us/politics/program-that-lets-foreigners-write-a-check-and-get-a-visa-draws-scrutiny.html?_r=0 (accessed May 4, 2018).

¹³⁴ The Caribbean Council, 'Caribbean Citizenship by Investment Schemes', December 3, 2014, p. 3.

Without a stringent due diligence check, the schemes may well have the potential to damage international reputations of the host states, which can lead other states to impose visa restrictions on the nationals from the host states. Similarly, it has been noted that the St. Kitts and Nevis's programme represents an innovated but risky attempt to economic diversification through attracting the financial capital necessary for development insofar as "by selling sovereignty and the state, the islands can effectively pursue economic development by trading security."¹³⁵ Accordingly, despite the fact that security concerns exist at the core of the citizenship programme, due to the lack of domestic and foreign capital, a clear economic benefit outweighs security concerns.

Scholars have indicated two main potential ramifications from citizenship-by-investment programmes: money laundering and visa-free travelling. Thus, St. Kitts and Nevis, as the first country to implement a citizenship-by-investment scheme, has restructured the scheme in order to eliminate or mitigate such repercussions over the past decades. For example, the St. Kitts and Nevis programme previously had a bond investment option for citizenship. But because of the allegation that applicants utilised the option to facilitate money laundering,¹³⁶ the St. Kitts and Nevis government decided to abolish the bond investment option.¹³⁷ This aligns with the US's allegation that the passports issued under the St. Kitts and Nevis citizenship-by-investment programme have been used for illegal financial transactions. The US had urged financial institutions to take a risk-based identity verification¹³⁸ by applying different levels of verification checks according to the risk of committing fraud. Thus, where an individual is found to have a higher risk, he/she needs to undergo more stringent checks. This is supported by FinCEN which argued that certain foreigners with the aim of undertaking illicit financial activities had abused the St. Kitts and

¹³⁵ H. S. Kassab, *Weak States in International Relations Theory: The Cases of Armenia, St. Kitts and Nevis, Lebanon and Cambodia*, New York: Palgrave Macmillan, 2015, Chapter 7. Weak State Autonomy: Armenia and St. Kitts and Nevis.

¹³⁶ It was alleged that the money for the bond investment originated from illicit activities.

¹³⁷ Government of St. Kitts and Nevis, Office of the Prime Minister, 'Citizenship by Investment Programmes Restructured over the Years', July 17, 2014, www.cuopm.com/?p=7982 (accessed December 12, 2017).

¹³⁸ A risk-based verification is used to deter the risks of money laundering and financing terrorists by identifying the channel between the business activities and those financial frauds. See further, HM Revenue & Customs, 'Anti-money Laundering Guidance for Trust or Company Service Providers', July 2010, p. 24.

Nevis citizenship programme;¹³⁹ especially a few Iranian businessmen on the list of a US Treasury Department Sanction-Evaders held St. Kitts and Nevis's passports.¹⁴⁰ This hinders a sanction including denial of benefits from being efficiently imposed on a targeted country since an individual from the country with another citizenship may well avoid the sanction.

In connection with the possibility of illicit financial activities, the programme has been criticised for its inadequate security, weak controls and inadequate administration. One of the US Department of Treasury's lead agencies has alleged that certain foreign individuals have by abuse taken advantage of the St. Kitts and Nevis citizenship-by-investment programme.¹⁴¹ For example, the son of the President of Equatorial Guinea who was charged by the American government for corruption is a dual citizen under the St. Kitts & Nevis's programme and Rustem Tursunbayev, a Russian who was accused of embezzlement in Kazakhstan, is also a holder of a St. Kitts and Nevis passport. Following the US allegations, St. Kitts and Nevis recalled approximately 16,000 passports, by requiring that passports be submitted to the foreign ministry in St. Kitts and Nevis in exchange for new ones. The old ones were otherwise deactivated and cancelled.¹⁴²

In addition to avoidance of international sanctions and money laundering, Canada and the US claimed that citizenship-by-investment schemes could cause threats to their national security especially due to visa-free travelling insofar as the passports under such schemes help obscure identities of travellers.¹⁴³ Visa-free-travel agreements between governments are concluded on the premise that each country's citizens are safe to admit, hence, no threat to their security. However, by naturalising foreigners who are not certified as non-threats to the other contracting party, the risk caused by

¹³⁹ US Department of Treasury, 2014, *supra* note 65.

¹⁴⁰ 'Russian Social Network Founder Flees Homeland after Acquiring St. Kitts and Nevis Passport', *Times Caribbean*, April 27, 2014, <http://timescaribbeanonline.com/russian-social-network-founder-flees-homeland-after-acquiring-st-kitts-nevis-passport/> (accessed May 4, 2018).

¹⁴¹ 'St. Kitts-Nevis Economic Citizen Split \$22.5 Million Corruption Pay-out', *Caribbean News Now*, June 10, 2014, [http://www.caribbeannewsnow.com/topstory-St-Kitts-Nevis-economic-citizen-split-\\$22.5-million-corruption-payout-21504.html](http://www.caribbeannewsnow.com/topstory-St-Kitts-Nevis-economic-citizen-split-$22.5-million-corruption-payout-21504.html) (accessed May 4, 2018).

¹⁴² E. Dezenski and E. Ottolenghi, 'A Better Way to Sell Citizenship', *The National Interest*, December 29, 2015, <http://nationalinterest.org/feature/better-way-sell-citizenship-14750> (accessed May 4, 2018).

¹⁴³ 'Canada Imposes Visa Requirement on St. Kitts and Nevis Citizens', *Caribbean News Now*, November 24, 2014, <http://www.caribbeannewsnow.com/topstory-Canada-imposes-visa-requirement-on-St-Kitts-Nevis-citizens-23753.html> (accessed May 4, 2018).

the citizenship programme in relation to visa-free travelling increases from the perspective of the other contracting party. For example, the Canadian government delayed the visa-free-travel agreement with Grenada due to Grenada's citizenship-by-investment scheme. It is claimed that the recall ensued from the increased security concerns regarding the St. Kitts and Nevis citizenship-by-investment programme whereby the Canadian government immediately required St. Kitts and Nevis citizens to hold a visa to enter Canada. The increased security concerns were due to the unsatisfactory procedures of passports issuance and the identity management practices by the authority of St. Kitts and Nevis in charge.

The Maltese Act shows the iterative reference to national security ranging from eligibility through ineligibility to deprivation. This tendency may be caused by the security concerns expressed by the US and Canada regarding the St. Kitts and Nevis scheme. Notwithstanding the emphasis on national security, the UK Immigration Minister David Hanson alluded to national security concerns arising out of the Maltese citizenship scheme, stating "this risks being a backdoor route to reside anywhere in the EU which is not a tight or appropriate immigration policy."¹⁴⁴ Thus, a citizenship-by-investment scheme by an EU Member State such as Cyprus, Malta and Bulgaria, entails a security risk to the whole EU Member States, which resulted in the intervention by the European Parliament and the European Commission in the Maltese IIP. Similarly, the programmes of the Caribbean island states, including Antigua and Barbuda and St. Kitts and Nevis, have given rise to some security concerns to other countries as demonstrated by Canada's imposition of entry visa on nationals from St. Kitts and Nevis and of the US's advisory document regarding Iranian nationals who hold St. Kitts and Nevis' passports.

While the risk of organised crime is still high in that people involved in such crime can more easily afford the programme given financial support from certain institutions they belong to, it is not appropriate to presume a naturalised citizen under a citizenship-by-investment programme can be a potential threat to the society and other countries. Therefore, it is recommended that countries introduce a code of conduct on ethics and

¹⁴⁴ H. Warrell and J. Fontanella-Khan, 'Malta Passport Sale Puts UK under Pressure', *Financial Times*, December 9, 2013, <http://www.ft.com/cms/s/0/7de0a9fe-60fe-11e3-b7f1-00144feabdc0.html#axzz47VMKt9ZL> (accessed May 8, 2018).

compliance and strengthen due diligence by great cooperation between law enforcement institutions and the industry involved, which will help avoid corruption and abuse in the future.

As aforementioned, some schemes have provisions which make reference to national security in ineligibility or deprivation considerations. Accordingly, for example, ‘if an applicant is a threat to national security of the country or other countries, the application will not be admitted’¹⁴⁵ or ‘if a naturalised citizen is found to have made disloyal speech or act to the country, citizenship will be withdrawn’.¹⁴⁶ Notwithstanding, few cases have demonstrated that applications were rejected on the ground of national security or that citizenship under such a scheme was revoked on the same ground. This is mainly because the procedure of examining applications is not revealed and withdrawal of citizenship remains unreported with a few exceptions. Moreover, the provisions regarding deprivation on the national security grounds have not clarified the scope and the meaning of national security in the context of the naturalisation scheme, which can increase the discretionary power of authorities.

In contrast to investment controlled by government, the impact of investment, by an investor who became a citizen under a citizenship-by-investment scheme, on socio-economic security is trivial and economic security issues are less likely to be relevant in the context of citizenship-by-investment programmes. This is because the scale of investment by a private investor is not sufficiently significant to pose a risk on economic security of the host state. For instance, financial requirements for the application as such could be (i) donating money to the host state and/or (ii) investing in specific sectors. In the first case, as the donation is not refundable, the investor does not reap profits and cannot transfer money out of the host state, hence no appearance of risks to economic or financial security. And in the second case of obtaining citizenship by investing in government bonds or real estate development, putting a small scale of investment in infrastructure projects, or participating in local business, the investor may have profits which she/he will reap in a few years. However, the profit is not significant enough to impact the country’s economy or critical infrastructures even if transfer of profits takes place. In other words, the amount of

¹⁴⁵ Article 6 of Maltese Citizenship Act, *supra* note 56.

¹⁴⁶ Article 10 of Maltese Citizenship Act.

money invested for certain industries – for example, in the case of St. Kitts and Nevis, the sugar industry for innovation, or in general, real estate industry – cannot easily destruct the whole industry involving public order and security interests. In Cyprus’s case, there is a provision for eligibility which specifies that being partly involved in the investment of critical infrastructure such as constructing roads¹⁴⁷ is also considered as the eligible investment for the citizenship scheme, which may seem to affect the critical infrastructure of the country. However, although an individual investor can be involved in establishing infrastructures such as bridges and toll roads, the investment plan will be divided by many investors as a form of joint investment. Hence, one investor can hardly exert a strong influence in operating the infrastructure.

Therefore, regarding citizenship-by-investment schemes which involve an individual foreign investor, the understanding of national security mainly focuses on military or diplomatic security pertinent to allegiance such as treason against the country that granted the citizenship. This is because the types of security issues which individual investors will cause are different from those which enterprises and GCIs can cause because the size of investment of individual investors tends to be significantly smaller than that of the latter.

5. Conclusion

This chapter analysed existing citizenship-by-investment schemes and shed light on the controversies surrounding them. The controversies focus mainly on, by reason of well-established international principles of citizenship, “a genuine link”, solidarity, and the democratic value of citizenship to the extent that citizenship should be granted in a non-discriminatory manner. This analysis led to the conclusion that the notion of a genuine link helps identify those who can be loyal and willing to contribute to the development and prosperity of a country. Simultaneously, the notion can be used to discriminate against a particular group. However, considering that the meaning of a link in the citizenship arena plays a certain role, it is questionable if a citizenship-by-investment scheme is expected to generate a connection between a naturalised citizen and the country in question. More specifically whether an economic contribution made by the naturalised citizen suffices to create the future connection. In addition to the

¹⁴⁷ Participation in company that carries out public work.

connection between a naturalised citizen and the host country, given the limited accessibility of programmes,¹⁴⁸ are the issues of fairness and value of citizenship which cannot be bought in exchange for money. By putting a price tag on citizenship, the citizenship programmes demonstrated the commercialisation of citizenship. Spiro argues that the commodification of citizenship is the by-product of the globalisation and recognition of dual/plural citizenship. However, the practical rationale for the advent of citizenship-by-investment programmes may be the failure of recovering from the financial crisis and introducing initiatives targeting foreign investment.

A citizenship-by-investment programme inevitably poses a question as to the legitimacy of granting citizenship to a foreign investor in exchange for money. A missing genuine link between the host state and the foreign investor further questions the legitimacy. And those challenges to the legitimacy may affect the status of the naturalised investors in the host state. Despite the requirements including the minimum duration for a certain period after obtaining citizenship and keeping the investment for a specified period, the reason for this clarification will be the stability and credibility of such type of citizenship. Therefore, neither the legitimacy can merely be gained by fulfilling the requirements, nor should the disapproval be given only through applying the traditional requirements for citizenship.

Even though the competence over nationality exclusively belongs to a state, considering the repercussions arising out of countries' nationality policy and membership, countries cannot overlook denunciations from the international communities including powerful countries, supranational institutions, and credit rating agencies. This is because one country's citizenship-by-investment scheme can be used as a tool to avoid economic and trade sanctions imposed globally and the scheme can also pose security risks to other countries by taking advantage of a visa-free travelling agreement. Furthermore, the programmes can be easily abused for an illicit financial activity such as money laundering. Hence for the sake of the credibility of citizenship given under the programme, governments and other institutions involved should undertake proper due diligence in the process.

¹⁴⁸ That is, such a citizenship-by-investment programme is only available to wealthy foreigners.

It is also noted that risks will increase unless transparency is pursued in the process such as the way funds are spent and an examination as to if the funds collected for donations are spent as envisaged for the sake of economic and social benefits of the country. Otherwise, governments implementing the schemes will be inundated with a denunciation of the policy's corruption, which leads to challenging the legitimacy of the programme. Moreover, this can easily influence the international reputation of the country concerned regarding their economic policies and credibility. This possibility becomes more evident in the case of the US's scathing remarks on the St. Kitts and Nevis citizenship-by-investment scheme. The previous Irish citizenship-by-investment programme demonstrated that only significant transparency, by avoiding corruption and bribery, can lead to mitigating perceived risks of the programmes.

Given international diplomacy and potential risk of using the programme for illicit financial activities, it is inevitable for citizenship granted under such schemes to be more exposed to scrutiny, revocation, or recall on the grounds of national security. Conversely, if the measures of revocation and recall become frequent, that will negatively influence the reliability of such schemes. That is why, in addition to conducting due diligence, control on numbers and transparency should converge. When it comes to revocation of citizenship, it is imperative to examine the cases thoroughly and apply the appropriate measures, considering the potential impact of threats to national security and the reputation of the scheme. Although this chapter confirms states' prerogative to determine citizenship matters, it argues that countries cannot escape criticisms for their citizenship policies at the domestic, the regional and the international levels. Given a plethora of criticisms on the policies, countries, especially St. Kitts and Nevis, have restructured their citizenship-by-investment programmes in order to mitigate possibility for abuse and risks to national security of the host state and other countries. As the cases above demonstrated, however, it is clear that the citizenship programmes are not fool-proof, but very susceptible to corruption and national security threats.

Of the countries which provide foreign investors with more favourable immigration incentives, there is a difference in the requirements, including the financial commitment and prior residence as well as the approaches to understanding national security regarding the naturalising process. While the programmes of some countries

insist on higher thresholds than others to ensure connection between an applicant and the host country, some countries do not emphasise other conditions such as language or a certain level of loyalty. This corroborates countries' diverse interpretations of the meaning of citizenship and national security.

Although most of the citizenship-by-investment schemes have a few references to national security, the schemes tend not to sufficiently provide the precise definition and scope of national security in the eligibility and revocation criteria. Instead, the schemes either emphasise the discretionary power of state to revoke citizenship,¹⁴⁹ or do not illustrate what types of national security matters may be added to the list of national security or how a government undertakes an examination on whether a naturalised citizen has become a threat.

As already stated above, an individual investor, as a naturalised citizen by investment or donation is less likely to pose any significant risk to socio-economic security like GCIs, given the scale of investment. Instead, it has been suggested that the scope of national security in this field will be merely limited to criminal records – a specific connection with national enemies or terrorist groups; and disloyal speeches or acts against the country. Inevitably, naturalised citizens under the programme can be more susceptible to deprivation of citizenship on the grounds of national security since they lack a residence history and they were not obliged to renounce their prior nationality. Therefore, the role of national security in the citizenship schemes calls for further clarification by policy-makers because the scope of national security can change depending on the international relations and concomitant risks in order to curtail discretionary or even arbitrary measures. It is also noteworthy how a host state deals with a naturalised citizen under a citizenship-by-investment programme when the programme does not have a provision regarding revocation on the grounds of national security. That is, whether the country will revoke the citizenship discretionally or by invoking another provision.

¹⁴⁹ For example, by periodic checks, Cyprus can withdraw the citizenship.

CHAPTER 5

National Security Derogations and Exceptions

1. Introduction (Background: Is there a Balance between a Foreign Investor and a Host State?)

As analysed in Chapter 1 and Chapter 3, the notion and the role of national security in security policies and security studies have evolved in the light of national and international events. In particular, events, such as the Second World War, the advent of the nuclear age and the oil shock, steadily diversified national security studies and adjusted the gravity of military security in the studies. Although military security has played a significant role in this process, the emergence of economic security stemming from international or regional economic crises, reliance on imported energy and the importance of critical infrastructure/strategic industries have shed light on different types of security and the way governments have broadened the notion of national security.

The previous chapters have demonstrated how states have used the concept of national security to derogate from their domestic and international obligations towards foreign investors, be they collective or individual actors. It is true that in a neo-liberalised investment system, governmental intervention in the financial or economic market is deemed to be an interventionist approach. However, in the IIL arena, governments sometimes implement restrictive measures regarding foreign investment and would invoke exceptions in IIAs to justify these measures. Nevertheless, the scope of exceptions in international investment treaties has never been clearly demarcated.¹

The objective of this chapter is to examine the current dynamics between host states and foreign investors, whether symmetric or asymmetric, and to highlight the role of exceptions, especially essential security interests in IIAs, in addressing this dynamics. The motivation of this examination is to probe the level (the extent) of regulatory space and, where regulatory space is found highly restricted, contemplate a new

¹ This is not limited to the essential security interests exception, but rather covers other exceptions such as public interest and public order in international investment treaties as well as doctrines of international law including the right to regulate and the police powers of state.

understanding of security as a solution to this challenge. Thus, the chapter discusses the rights of foreign investors and the options for flexibility available to a host state and examines how tribunals approach the relationship between the rights of foreign investors and the policy-space of host states. This will lead to a discussion on how a newly conceptualised concept of security can contribute to adjusting the asymmetric dynamics by complementing other escape clauses. This is not solely motivated to secure or even widen policy space of host states, which may lead to disproportionately favouring host states over foreign investors. Instead, it attempts to find a means of striking a balance between the protection of foreign investors' rights and the policy-space of host states and to delineate the scope of security derogations more overtly so that predictability can be enhanced.

Therefore, this chapter demonstrates whether regulatory space of a host state has been accommodated. This is approached by especially discussing cases in relation to the doctrine of police powers under customary international law that host states have used to avoid compensatory obligation concerning expropriatory measures taken for public interests. After examining those precedents, the chapter analyses the potential changes in *ex-post* and *ex-ante* government measures which may affect foreign investors and foreign investments following the application of the broadened concept of security. Lastly, this chapter envisages a new approach to understanding compensation when a state exercises its regulatory power and discusses the viability of the suggested scope of security exceptions.

2. Challenges to Regulatory Space

The regulatory space of host states has been diminished in parallel with the conclusion of international agreements and the development of soft law.² Soft law could exist in the form of guidelines and conditionalities which are contractual terms and conditions that a recipient country is required to agree in exchange for a loan, aid or debt relief – as established by international organisations.³ Moreover, state contracts – including a

² Soft law is widely defined as “hortatory obligations” rather than legally binding. The concept of soft law became popular since countries faced difficulties in concluding or developing further a multilateral agreement due to diverse member states ranging from developing countries to developed countries which have different socio-economic interests. Yet, in reality, soft law has been evaluated as effective as hard law in terms of enforcement in spite of its non-binding characteristic. See further, A. T. Guzman and T. L. Meyer, ‘International Soft Law’, *Journal of Legal Analysis*, vol. 2, no. 1, 2010.

³ Conditionalities can be imposed by international organisations, mainly the World Bank, and the International Monetary Fund, or can be drafted by a donor country in case of bilateral loans and aids.

concession agreement, i.e. a natural resource exploitation contract such as mining, made between foreign investors and host states – usually prevent host states from introducing new rules which could negatively affect foreign investment. If the BIT between a host state and a home state provides for the umbrella clause, foreign investors can claim that newly introduced rules impinge on their rights, whereby the host state violates its domestic obligations⁴ and international obligations.⁵

The restraint on regulatory space because of IIAs is well illustrated in *Santa Elena v. Costa Rica*⁶ and *Too v. Greater Modesto Insurance Associates*.⁷ The cases alleged the violations of indirect expropriation and fair and equitable treatment clauses. In both cases, foreign investors filed a claim that measures taken by the host state and changes in policy amounted to expropriation. In response, the host states argued that the measures were implemented within the scope of the police powers of the state; hence there was no obligation to compensate. Notwithstanding, as will be further discussed below, even though the states implemented a measure for the public interest, it might not avoid the obligation to pay compensation.

The conclusion of IIAs, thus, has resulted in increased policy costs. For example, it is possible for a host state not to take into account the risk that the measure concerned can be tantamount to expropriation when a state takes a measure necessary to pursue its general public interest. This is because the state could consider the measure for the protection of public interest to fall within its regulatory powers. However, a foreign investor whose interests are detrimentally affected would logically claim that the host

⁴ UNCTAD, 'State Contracts', UNCTAD Series on Issues in International Investment Agreements, New York and Geneva, UN, 2004 (UNCTAD/ITE/IIT/2004/11).

⁵ This is because an umbrella clause in a BIT provides more general protection for foreign investors, in addition to treaty protection, related to any other contractual commitments that a host state entered into. See further, OECD, *International Investment Law: Understanding Concepts and Tracking Innovations*, Paris: OECD, 2008, Chapter 2.

⁶ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Feb 17, 2000 (hereinafter *Santa Elena Award*).

⁷ *Emanuel Too v. Greater Modesto Insurance Associates and USA*, December 29, 1989, vol. 23 Iran-United States CTR 378. See also, *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB (AF)/97/1, August 30, 2000 (hereinafter *Metalclad Award*); *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004 (hereinafter *SGS Award*); *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 (hereinafter *Saluka Award*); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, January 17, 2007 (hereinafter *Siemens Award*); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, August 27, 2008 (hereinafter *Plama Award*); and *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, May 29, 2003 (hereinafter *Tecmed Award*).

state must pay compensation for the loss in accordance with an IIA between them. The amount of compensation can exceed the budget for the policy in question, which could decrease the cost-efficiency of the policy. Hence, the host state would rather not adopt any measures necessary for its development. Thus, the host state's regulatory space is confined, and, in the end, can dissuade it from ratifying an IIA.

Moreover, the high thresholds for invoking exceptions aggravate this phenomenon. If a host state implements a measure on the grounds of necessity, or essential security interests in IIAs, the host state must comply with certain stringent conditions. For instance, one of the conditions is that the measure should be the least trade/investment-restrictive. This condition, however, can lead to a controversy over whether there were other policy options which would have had a lesser effect on foreign investors' interests comparatively to the measure actually undertaken.⁸ This unpredictability also becomes a serious impediment on a policy adoption or even deters a host state from implementing a measure, where necessary. Therefore, despite the inclusion of escape clauses for flexibility in IIAs, the applicability of such clauses and the dynamic between foreign investors and host states become questionable.

Before examining the efficiency of escape clauses and flexibility tools, to gauge the protection accorded to foreign investors by a host state, we need to briefly discuss some rights of foreign investors: fair and equitable treatment (FET), national treatment (NT), most favoured nation (MFN) treatment, and an umbrella clause.

2.1. The Rights of Foreign Investors

The controversy over whether or not the relationship between foreign investors and host states is balanced has been examined over the decades.⁹ In order to find out an effective method to strike a right balance between the interests of host states and those

⁸ The *Continental* tribunal noted that other alternatives did not seem viable or less disruptive than the measures taken by the Argentine government. See further, *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, September 5, 2008, para 231.

⁹ J. W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries', in F. Beveridge (ed.), *Globalization and International Investment*, Routledge, 2017. See further, B. Kingsbury, and S. Schill. 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality', in S. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, 2010.

of foreign investors, it is imperative to examine the current regime of foreign investors' rights granted under IIAs or BITs as well as host states' obligation to provide full security and protection to foreign investment.

Contracting parties conclude BITs and IIAs with the intention of promoting international investments. This is achieved by promising certain international standard protection to foreign investors, which enhances the host state's attractiveness as a foreign investment destination. Despite the benefits, IIAs may restrain the regulatory space and discourage host states from formulating new regulations which affect foreign investment, if the host state cannot afford compensation where the regulations are judged expropriatory. Thus, the fundamental characteristic of agreements is to seek to minimise the leeway given to host states to deter arbitrary measures against foreign investors.¹⁰ Therefore, clauses in BITs and IIAs encompass MFN treatment, NT, FET, an umbrella clause, and the right to compensation in case of expropriation based on the Hull Rule¹¹.

Firstly, MFN treatment provides that beneficial treatment granted to a foreign investor from one state shall also be granted to a foreign investor from another state. In other words, there should be no discrimination between trading partners. NT refers to a commitment that a host state shall treat a foreign investor as equally as a domestic investor. The essence of NT is that there should be no discrimination between a foreign investor and a domestic investor. FET has a more comprehensive feature than MFN and NT given that FET requires "an attitude to governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that maybe affected by a State's decision in question, [...]".¹² Thus, there is no standard to determine whether a host state has failed to provide FET to the foreign investor concerned, which implies a broad and general protection for foreign investors. Furthermore, the right to compensation in the case of expropriation refers to the situation where a foreign investor's investments and assets are expropriated wholly or

¹⁰ R. Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law', *New York University Journal of International Law and Politics*, vol. 37, 2004, p. 953.

¹¹ The right to compensation will be discussed in the following section. When expropriation takes place, the host state has the obligation to pay prompt, adequate and effective compensation. This standard was put forth by the statement of the American Secretary of State, Cordell Hull in response to the confiscation of American citizens' property by the Mexican government from 1915 and 1940.

¹² UNCTAD, 'Fair and Equitable Treatment', UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, UN, 2012, p. 7.

partly following a host state's measure; the foreign investor thus can claim compensation for the loss caused by the measure against the host state.¹³

In contrast, an umbrella clause amalgamates contractual commitments outside the IIA with the terms specified in the IIA. In other words, the clause binds a host state to observe the contractual commitments made with foreign investors, such as state contracts and concession agreements as well as provide foreign investors with broad protection for their assets, in addition to the minimum standards which foreign investors are entitled to, i.e. protection under customary international law. Apart from the substantive protection, regarding procedures, BITs often accord a foreign investor the right to resort to international dispute settlement. Such dispute settlement measure could be to resort to either a tribunal of the ICSID or an *ad hoc* proceeding,¹⁴ rather than to the domestic court, where the affected investment is not treated in accordance with the relevant BIT. Thus, if an international tribunal regards a BIT as a tool to protect the rights of foreign investors and promote foreign investment without considering public interests, a host state may face an interpretation which disregards the interests of that host state, but favours the interests of foreign investors.

Contrary to the wider protection for foreign investors, regarding clauses for policy space, i.e. exceptions, with stringent requirements for invocation, BITs and IIAs tend to have restrictive and negative wordings in order to diminish the possibility of invoking such clauses. For example, Article 18: Essential Security of the US Model BIT 2012 provides that “[N]othing in this Treaty shall be construed [...]”¹⁵ and Article 20: Financial Services of the Model BIT also specifies “a Party shall not be prevented from adopting or maintaining measures in relation to financial services for prudential reasons [...]”.¹⁶ The tendency that provisions regarding the right of a host state to regulate exist as exceptions in IIAs confirms that IIAs are drafted to protect foreign investors and foreign investment rather than host states. Therefore, the rights of foreign investors in IIAs are not confined to a specific scope but are somewhat open-ended whereas host states' right to regulate is clearly restricted. This can restrict the scope of

¹³ This is further discussed in the following section.

¹⁴ Based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

¹⁵ 2012 US Model Bilateral Investment Treaty.

¹⁶ Ibid.

legitimate measures or regulations which are implemented in order to protect public interests.¹⁷

2.2. Regulatory Space Accommodated by the Right to Expropriate and Police Powers

It is well recognised that where a host state expropriates an investment directly or indirectly, the state must comply with the conditions of expropriation.¹⁸ The requirements for a lawful expropriation were developed in customary international law on expropriation, and they have been recognised by the ICSID and *ad hoc* tribunals and incorporated in provisions on expropriation in many BITs and IIAs.¹⁹ The requirements based on the Hull Rule are: the measures which amount to indirect or direct expropriation should be taken “(i) for a public purpose related to the internal needs of that Party; (ii) on a non-discriminatory basis; (iii) against prompt, adequate and effective compensation.”²⁰

Whereas it is clear whether a direct expropriation, by transferring the owner of the business has taken place or not, the decision as to if a governmental measure is an indirect expropriation requires further examination. The examination is to determine whether the measure concerned falls within the ambit of regulatory space thereby resulting in no compensation or amounts to an expropriation. The OECD 2004 report on “Indirect Expropriation” and the “Right to Regulate” in International Investment Law²¹ (hereafter the OECD 2004 report) also suggests that a few of the US Free Trade Agreements²² and the US model BIT provided the criteria to establish indirect expropriation, despite the necessity of case-by-case examination, which are:

¹⁷ Kingsbury and Schill, 2010, *supra* note 9, p. 76.

¹⁸ C. Schreuer, ‘The Concept of Expropriation under the ETC and Other Investment Protection Treaties’, *Transnational Dispute Management*, vol. 2, no. 3.

¹⁹ A. van Aaken, ‘International Investment Law between Commitment and Flexibility: A Contract Theory Analysis’, *Journal of International Economic Law*, vol. 12, no. 2, 2009, p. 510.

²⁰ *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, March 2015, para 122.

²¹ OECD, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law”, OECD Working Papers on International Investment, 2004/04, *OECD*, 2004.

²² The US FTAs with Australia (signed in 2004), Chile (signed in 2003), Central America (i.e. Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) - Dominican Republic (signed in 2004), Morocco (signed in 2004) and Rwanda (signed in 2008).

- 2 the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- 3 the extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and
- 4 the character of the government action.²³

Again, to be lawful, an expropriatory measure must meet the requirements referenced above. However, whereas payment of compensation for the loss caused by a regulation is accepted as a norm, customary international law provides for a police power exception which does not necessarily require compensation with the proviso that economic injury or the impairment on foreign investment stems from a *bona fide* non-discriminatory regulation, policy or measure within the scope of the police power.²⁴ For the distinction between a legitimate regulatory measure based on the police powers of the state and an expropriatory measure (indirect expropriation), the US FTAs and the US model BIT provide that;²⁵

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.²⁶

This exception can also be found in Canada's 2004 model Foreign Investment Promotion and Protection Agreement (FIPA),²⁷ thus signifying that the approach is not only taken by the US government. Other countries have adopted the same approach to demarcate the scope of (indirect) expropriations, distinct from legitimate regulatory measures which do not entail compensatory obligation. Further, the OECD 2004 report shows that tribunals tend to rely on certain standards in order to distinguish between indirect expropriation and regulatory taking, which is not compensable. These are: (i)

²³ 2012 US Model BIT, *supra* note 15, Annex B. Expropriation, p. 41.

²⁴ OECD, 2004, *supra* note 21.

²⁵ For instance, this can be found in Annex B para. 4(b) of the BIT between US and Rwanda as well as in the 2012 US Model BIT in Annex B.

²⁶ 2012 US Model BIT, Annex B, *supra* note 15.

²⁷ Especially Article 13 and Annex B. 13(1) (c).

the extent to which the governmental measure affected a foreign investor's assets; (ii) what the objective the state wanted to achieve by the action was; and (iii) whether the measure was reasonable with the legitimate expectations of foreign investors.²⁸ Notwithstanding the above criteria, tribunals are required to examine whether there is expropriation on a case-by-case basis by interpreting relevant treaty clauses.²⁹

In addition to the police powers doctrine, under domestic law, the Exon-Florio Amendment to the Omnibus Trade Act allows the US President to intervene in the US investment market on the ground of national security. This has raised questions relating to takings and compensation.³⁰ This presidential authority may well impinge on the rights of foreign investors to establish their investment (the Greenfield investment), which involve property rights and national treatment. The EU has criticised this legislation arguing that compensation is not foreseeable.³¹ The US would argue that this is within its regulatory power and thus does not lead to compensable takings.³² Environmental takings are always subject to compensation in *Tecmed* and *Santa Elena* where the tribunals held that environmental takings are "similar to any other expropriatory measures that a state may take in order to implement its policies."³³ Sornarajah asserts that any taking which stems from economic reasons should be subject to compensation, but where an overriding public interest exists, it may not entail an obligation to compensation.³⁴ However, a clear distinction has not been made between takings motivated by economic reasons and takings for preponderant public interests, i.e. compensable takings and regulatory (non-compensable) takings. Rosalyn Higgins has noted that the distinction is not simply possible and that states have an obligation to compensation for both cases, without providing any criteria for the distinction.³⁵ In contrast, it is also argued that

²⁸ OECD, 2004, *supra* note 21, p. 22.

²⁹ 2012 US Model BIT, Annex B, *supra* note 15.

³⁰ M. Sornarajah, *The International Law on Foreign Investment*, 4th edn., Cambridge University Press, 2017, p. 545.

³¹ 'European Community: Statement on US Policy on Foreign Direct Investment', *International Legal Materials*, vol. 31, no. 2, p. 467. See also 'United States: Department of the Treasury Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons', *International Legal Materials*, vol. 31, no. 2, p. 424.

³² Sornarajah, 2017, *supra* note 30.

³³ *Santa Elena Award*, *supra* note 6, para 72.

³⁴ Sornarajah, 2017, *supra* note 30, p. 531.

³⁵ R. Higgins, 'The Taking of Property by the State: Recent Developments in International Law', *Hague Recueil*, vol. 176, 1982, p. 331.

the category of regulatory takings should be established distinct from that of indirect expropriation,³⁶ but this seems unviable because security matters are constantly changing.

While environmental security and energy security can fall within the scope of a broadened notion of security, it is not reasonable to allow a state to implement an act related to the protection of the environment or natural resources. The severity and exogenous variables of a security issue can vary depending on the surroundings. Accordingly, what is considered a security issue in different countries varies, and the issue could be de-securitised in the future. This feature makes it more complicated to draft an agreement with a specific list of measures which can be deemed as indirect expropriation, not falling within the scope of regulatory takings.

The role of the police powers doctrine has been discussed in assessing the legality of a governmental measure.³⁷ The police power doctrine is designed “to secure and promote the public welfare”.³⁸ Specifically, for instance, the Tenth Amendment to the US Constitution provides that police power is the authority “to enact measures to preserve and protect the safety, health, welfare and morals of the community.”³⁹ This definition signifies that a government shall take measures with the aim of protecting the public interest. While discussing the role of the doctrine, some commentators regard police power as the overriding factor.⁴⁰ In other words, the doctrine is not influenced or balanced by other elements.⁴¹ Thus, once a state measure is determined to fall within the scope of police powers, the country does not take the obligation to compensation. Regarding police powers, Sornarajah confirms that if a non-discriminatory measure implemented by a host state is pertinent to some issues, such as security, environmental preservation, consumer protection, anti-trust or land issues, compensation may not be required since the measure in question is essential for the

³⁶ S. H. Nikiema, ‘Compensation for Expropriation’, Best Practices Series, *International Institute for Sustainable Development*, 2013.

³⁷ OECD, 2004, *supra* note 21, p. 14.

³⁸ E. Freund, *The Police Power, Public Policy and Constitutional Rights*, Chicago: University of Chicago Press, 1904.

³⁹ US The Tenth Amendment to the Constitution.

⁴⁰ B. Mostafa, ‘The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law’, *Australian International Law Journal*, vol. 15, 2008, pp. 272-273; A. S. Weiner, ‘Indirect Expropriation: The Need for a Taxonomy of Legitimate Regulatory Purposes’, *International Law Forum*, vol. 5, no. 3, p. 170.

⁴¹ OECD, 2004, *supra* note 21, p. 18.

protection of national values.⁴² However, to be exempt from this payment, a host state or defendant – where a foreign investor files a claim accusing a host state of expropriation – should demonstrate that there exists an overwhelming public interest and such a measure or taking was indispensable.

This is also supported by the *Restatement Third of the Foreign Relations Law of the United States* which discusses how justifiable governmental regulations within the ambit of police powers can be differentiated from indirect expropriation.⁴³ The commentary pointed out that “[A] state is not responsible for loss of property or other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory...”⁴⁴ Contrariwise, Sornarajah suggested a list of expropriatory takings which are more specific than the criteria to constitute an indirect expropriation in the US FTAs and the US model FTA. Among them, the types of measures that can be related to indirect expropriations cover:

- (iv) failure to provide protection when there is interference with the property of the foreign investor;
- (v) administrative decisions which annul concession licences and permits necessary for the business in the jurisdiction;
- (vi) adjustment in taxation - the right to increase taxation or royalties in a concession agreement, is accepted not in violation of property rights, which means, not a compensable taking as long as taxation is not excessive – otherwise, it would bear the possibility of a disguised expropriation;⁴⁵
- (vii) treatment on the contrary to international law; or
- (viii) undertakings of harassment including freezing their assets rather than direct and practical nationalisation or expropriation such as takeover of management control over the investment.⁴⁶

⁴² Sornarajah, 2017, *supra* note 30, p. 443.

⁴³ American Law Institute, ‘Restatement of the Law, Third, The Foreign Relations of the United States’, *American Law Institute Publishers*, Volume 1, 1987, Section 712, Comment g.

⁴⁴ *Ibid.*

⁴⁵ A relevant case can be *Gudmundsson v. Iceland*, ECHR no. 511/59, December 20, 1960.

⁴⁶ Sornarajah, 2017, pp. 436-437.

Since the types of state actions illustrated in the commentary and the list of indirect expropriation have a certain overlap, it is still not clear what types of state actions are ‘within the police powers of the states.’ This has generated much confusion regarding whether a state measure lies within the police power so that the action does not result in compensation for loss of foreign investment. Otherwise, the measure in question is an expropriation which entails the state obligation to pay full compensation, which is evidenced in a couple of cases where a state measure was found to constitute an expropriation. The OECD 2004 report suggested that one of the most determinant factors to decide whether or not a state measure is expropriatory is the consideration of “social purpose” or the “general welfare”⁴⁷ in the measure.⁴⁸ Similarly, George Christie also argues that “the existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no ‘taking’”.⁴⁹ However, as discussed in the previous section, some tribunals noted that the purpose or objective of the policy concerned might not be taken into account in determining the obligation to compensation; instead, the effect arising from the policy should play the determinant role.

On the one hand, it is not certain whether, in case of adopting a measure resulting in loss of foreign investment, a government should be obliged to pay compensation unquestionably, or should be exempted as a police power exception, stemming from the unclear boundary of police power. On the other, Sornarajah also points out the difficulty in exempting from the obligation to pay full compensation.⁵⁰ This is mainly because property rights have been protected as one of the constitutional rights, particularly in the US,⁵¹ whereby payment of compensation for expropriating property has been a norm. The protection of property rights has also been strengthened by neo-liberal rules which prioritise the protection of individual property rights over that of public interests by governmental measures.

⁴⁷ B. H. Weston, “‘Constructive Takings’ under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’”, *Virginia Journal of International Law*, vol. 16, 1975, p. 112.

⁴⁸ OECD, 2004, *supra* note 21, p. 16.

⁴⁹ G. Christie, ‘What Constitutes a Taking of Property under International Law?’, *British Yearbook of International Law*, vol. 38, 1962, p. 338.

⁵⁰ Sornarajah, 2017, *supra* note 30, p. 454.

⁵¹ *Ibid.*

This trend is evident *inter alia* in *Santa Elena v. Costa Rica*⁵² where the tribunal held:

Expropriatory environmental measures – no matter how laudable and how beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.

Likewise, despite many tribunals’ acknowledgement of the police power doctrine, the governmental obligation to compensation has been reiterated in several ICSID cases including *Metalclad v. Mexico*.⁵³ There are two main reasons why the ICSID tribunals highlighted that states should pay compensation for such a taking or measure which amounts to expropriation – indirect expropriation. First, the ICSID or any adjudicative body attempts to ensure that governments should not refrain from taking measures targeting the protection of the environment. Secondly, with the goal of protecting foreign investors’ assets, the ICSID and *ad hoc* dispute settlement bodies examine whether a government attempts to provide unfair and discriminatory treatment towards foreign investors by implementing regulations which can negatively influence their investment or even overturn their investment practically. While tribunals recognise police powers, they are likely to accentuate the importance of paying compensation to foreign investors who suffer loss caused by a state measure.

Yet, *Too v. Greater Modesto Insurance Associates* presents a case where the ICSID recognised the exercise of the police power and thereby excepted the obligation to compensation. The tribunal held that:⁵⁴

[A] State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price [...].

⁵² *Santa Elena Award*, *supra* note 6, para 72.

⁵³ *Metalclad Award*, *supra* note 7.

⁵⁴ *Emanuel Too v. Greater Modesto Insurance Associates and USA*, *supra* note 7, para 26.

The same rationale was iterated in several cases including *Tecmed v. Mexico* in which the Tribunal remarked on the police power of states, holding that:

The principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its power as administrator without entitling them to any compensation whatsoever is undisputable.⁵⁵

While the *Tecmed* tribunal recognised the sovereign power, it found that such action should conform to international law and the agreement in question – here, the Agreement on the Reciprocal Promotion and Protection of Investments between Spain and Mexico – and held that the host state breached its obligation on fair and equitable treatment and expropriation. Furthermore, by referring to the practice of the European Court of Human Rights (ECHR) which underlined the importance of striking a fair balance between public interests and private interests regarding a state measure, i.e. in the case of expropriation, the control of use,⁵⁶ the *Tecmed* tribunal noted that to decide whether an action taken by a host state falls within the realm of expropriation, they need to examine “whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments.”⁵⁷ This shows that in spite the tribunals' recognition on the regulatory power, a host state still faces the difficulty in taking a measure necessary in compliance with international law as well as domestic law.

The *Methanex v. USA* case under NAFTA showed the similar distinction between indirect expropriation and non-compensable regulatory taking within the ambit of police power. The matter concerned the California ban “on the sale and the use of the gasoline additive” for the protection of public health. The tribunal stated that:

But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and,

⁵⁵ *Tecmed Award*, *supra* note 7, para 119.

⁵⁶ H. Mountfield, ‘Regulatory Expropriations in Europe: the Approach of the European Court of Human Rights’, *N.Y.U. Environmental Law Journal*, vol. 11, no. 1, 2002, pp. 136-147.

⁵⁷ *Tecmed Award*, *supra* note 7, para 122.

which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable [...] ⁵⁸

The tribunal found that the measure was implemented for the public interest in a non-discriminatory manner with compliance to due process. Thus the ban was a legitimate policy which did not require compensation by rejecting the Methanex's claim on expropriation. ⁵⁹ Yet, whereas measures, aimed at preserving the environment, have been widely understood to entail payment of compensation for the loss, the exemption on police power measures, and the right for governments to regulate are still examined on a case-by-case basis.

The investor's expectations when deciding to locate his/her investment in the host state are another factor taken into account in determining whether a foreign investor is entitled to compensation for loss. The expectations should not be unreasonably subjective. ⁶⁰ The *Starrett Housing Corp. v. Iran* case discusses the approach to determine the reasonable expectation standard. The tribunal noted that:

Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken. ⁶¹

The *Tecmed* tribunal held that the measure taken by the Mexican government should be reasonable to the policy objective, and the "legitimate expectations" of those whose investment and assets were negatively influenced. The tribunal also added that since foreign investors may well expect their investments will last sufficiently long so that they can reap profits out of their investments prior to the decision to make an investment, the tribunal needs to take the legitimate expectations into account in line with the agreement concerned and international law. ⁶² By applying this approach and

⁵⁸ *Methanex Corporation v. United States of America*, UNCITRAL, August 9, 2005, Part IV, Chapter D, para 7.

⁵⁹ Ibid paras 15-16.

⁶⁰ OECD, 2004, *supra* note 21, p. 19.

⁶¹ *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat*, 16 Iran-US C.T.R, Case No. 24, 1983, pp. 156-157.

⁶² *Tecmed Award*, *supra* note 7, para 50.

the proportionality test, the tribunal found that the state measure amounted to expropriation. Notwithstanding, Newcombe underlines the importance of the obligation for a host state to pay compensation for expropriation even if an IIA tribunal concluded that the measure is necessary for public interest, public order and legitimate policy objective,⁶³ claiming that “if an expropriatory measure is necessary to protect “human, animal or plant life or health”, the state may take the measure, but still must pay compensation.”⁶⁴

Thus, it would be particularly difficult for a host state to prove that its actions do not result in its obligation to compensate. This is so particularly where (i) the belief that a host state should pay compensation to a foreign investor for a regulatory taking is predominant and (ii) the thresholds for a state to derogate from its duty to compensation stemming from its policy are high and even are not easy to determine. Therefore, despite the deference to the police powers of states, tribunals are likely to find that foreign investors are entitled to compensation. Thus, although it is acknowledged that in order to fall within the ambit of non-compensable takings as discussed above, measures should be non-discriminatory and motivated by public purpose, it is necessary to contemplate another option in order to secure certain policy-space with the aim of striking a balance between the interests of foreign investors and those of host states. It is true that awards given by ICSID tribunals or *ad hoc* proceedings based on the UNCITRAL’s rules do not have any binding effects *de jure*, but their approach with respect to exceptions, such as essential security interests, and the obligation to pay adequate compensation ensuing from measures can provide fruitful insights for further development in interpreting exceptions to pursue a more balanced approach in IIAs between the interests of foreign investors and those of host states.

⁶³ This argument may lead to more questions: such as the legitimacy of the EU directive on environmental policy such as CO₂ emission, which does not render any obligation to pay compensation; the existence of sustainable development and economic prosperity which exists in line with the protection of foreign investors and the promotion of foreign investment in preamble; and excessive emphasis on property rights with disregarding non-discriminatory measure for the public purpose.

⁶⁴ A. Newcombe, ‘Sustainable Development and Investment Treaty Law’, *Journal of World Investment Trade*, vol. 8, no. 3, 2007.

2.3. The Tribunals' Tendency

While there is little disagreement on the notion of legal expropriations, tribunals may take different approaches regarding which factors/criteria should be applied for the assessment of the legitimacy of a measure.

Some tribunals⁶⁵ have focused on the effect of a state's measure in question on foreign investors as the "sole criterion"⁶⁶ in determining whether the measure is an expropriation, while others have to take into consideration other factors, such as the intention and the context of the measure.⁶⁷ Among tribunals, there has also been a conflict with respect to examining the applicable criteria. The *Tippetts* case shows that that the effect of state measures on a foreign investor plays a more significant role than the objective of the state measure in tribunal determinations. The tribunal held that "the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."⁶⁸ Similarly, the *Metalclad* case tribunal under the NAFTA pointed out that the tribunal "need not decide or consider the motivation, or intent of the adoption of the Ecological Decree"⁶⁹ when examining whether a state measure amounted to an expropriation. The tribunal added that:

[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title (direct expropriation), but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property (indirect

⁶⁵ For example, this approach is taken by the tribunal of *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-US C.T.R., Case no. 7, 1984 (hereinafter *Tippetts Award*).

⁶⁶ Where the sole effects criterion is adopted, a tribunal emphasises the effect of the measures on the value of the investment without paying attention "to the nature of the act" in assessing the legality of the measure. See, V. Heiskanen, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation', *Journal of the International Law FORUM*, vol. 5, no. 3, 2003, p. 177.

⁶⁷ R. Dolzer, 'Indirect Expropriations: New Developments?', *N.Y.U. Environmental Law Journal*, vol. 11, 2002, p. 79; C. Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', *Journal of International Economic Law*, vol. 15, no. 1, 2012.

⁶⁸ *Tippetts Award*, *supra* note 65, pp. 225-226.

⁶⁹ *Metalclad Award*, *supra* note 7, para 111.

expropriation) even if not necessarily to the obvious benefit of the host State.⁷⁰ (Bracket added)

Although acknowledging a state's sovereign duty to pursue the protection of essential interests, the *Phelps Dodge* tribunal underlines the obligation for a government to pay compensation for the loss caused by a state measure irrespective of the purpose of the measure. In response to the actions taken by the Iranian government to protect from negative impacts arising out of the Iranian Revolution, the tribunal stated that:

The Tribunal fully understands the reasons why the respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.⁷¹

The approach of the tribunals in the aforementioned cases showed that as far as those tribunals are concerned, the intent or the purpose of a governmental measure is less important than the impact of the measure in determining whether or not a host state is obliged to pay compensation since the impact on foreign investors has taken place and the host state has the responsibility for such an impact by implementing the measure regardless of the objective of the policy.

Contrary to an effects-based approach, an analysis on the objective of the policy or measure introduced by a government often takes place. In such cases, tribunals examine whether the measure is purely driven by public interests or has the characteristic of protectionism by treating domestic investors more favourably than foreign ones. The concurring opinion of the *S.D Myers v. Canada* case also pointed out that the measure, i.e. the ban on PCB exports, was motivated by protectionism, and could not be justified. The determination of whether there is a denial of national treatment to investors or investments 'in like circumstances' under Article 1102 of NAFTA may require an examination of whether a government treated non-nationals

⁷⁰ Ibid para 103.

⁷¹ *Phelps Dodge International Corp. v. The Islamic Republic of Iran*, 6 Iran-US C.T.R. Case No. 99, 1986, para 22, p. 130.

differently for a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade.⁷²

Regarding the scope of exceptions, tribunals have reiterated the necessity of a restrictive approach. Although it is comprehensive that exceptions in the agreement should be read narrowly in order to deter any abusive invocation of the exceptions, the Decision on Preliminary Question in the *Canfor Corporation v. United States of America* and *Terminal Forest Products Ltd. v. United States of America* case under NAFTA confirmed this restrictive interpretation, stating that:

The present Tribunal subscribes to the view expressed by the GATT Panel in *Canada - Import Restrictions on Ice Cream and Yoghurt*: “The Panel [...] noted, as had previous panels, that exceptions were to be interpreted narrowly and considered that this argued against flexible interpretation of Article XI:2(c)(i).”⁷³

Despite the divergences among tribunals in terms of approaches regarding whether to focus on the effect/impact of state measures or on the objective/purpose, tribunals have shown an increasing tendency of recourse to the approach that unless a state measure for the purpose of a public interest, in effect, leads to the cessation of the ownership of the investment or the complete loss of the value of the investment, it is less likely for the measure to amount to an expropriation, except in extreme situations.⁷⁴

In addition to adopting a restrictive approach to exceptions, tribunals tend to rely on the title and the preamble of BIT in order to interpret clauses in a BIT which do not provide specific conditions for invocation or which have room for more judicial interpretation.⁷⁵ In *Siemens v Argentina*, the tribunal underscored that the treaty is “to protect and to promote” foreign investment and noted that the intention of the parties

⁷² Separate Concurring Opinion by Dr. Bryan Schwartz of *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, November 13, 2000, para 129.

⁷³ Decision on Preliminary Question on *Canfor Corporation v. United States of America* and *Terminal Forest Products Ltd. v. United States of America*, June 6, 2006, para 187.

⁷⁴ Y. Radi, ‘International Investment Law and Development: A History of Two Concepts’, in R. Hofmann, S. Schill and C. Tams (eds.), *International Investment Law and Development: Bridging the Gap*, Edward Elgar, 2015, p. 79.

⁷⁵ In particular, FET can be an exemplar of the clauses in that FET has a comprehensive scope by requiring a host state to have “an attitude to governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that maybe affected by a State’s decision in question, [...]”, see UNCTAD, 2012, *supra* note 12, p. 7.

was to create favourable conditions conducive to investment.⁷⁶ The same approach was adopted in *SGS S.A. v. Republic of the Philippines* where the tribunal held that “[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investment” since the treaty was concluded in order to contribute to creating favourable conditions for investors and investments by interpreting in favour of foreign investors.⁷⁷

Other tribunals, such as the *Saluka v. Czech Republic* tribunal, have observed that the purpose of investment treaties is to encourage foreign investment and to develop “the parties’ economic relations.”⁷⁸ In this way, tribunals have adopted a more balanced approach rather than only focusing on the protection of the rights of foreign investors: “[a]n interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host states from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.”⁷⁹ Similarly, the *Plama v. Bulgaria* tribunal stated that excessive emphasis on the aim of a treaty may well spur a teleological interpretation based on the preamble, i.e. protecting the rights of foreign investment and promoting foreign investment, which can lead to even denying “the relevance of the intentions of the parties”, as Sir Ian Sinclair warned.⁸⁰ This contrast in the tribunals’ approaches calls for a more balanced approach.

Although the emphasis on either of the approaches in choosing criteria can be dependent on the treaty, extreme teleological interpretation based on the preamble or the title of BIT can distort the intentions of the parties and disregard the interests of host states especially when they have essential public interests, such as health, security or public order, to protect. Some tribunals suggested other criteria to determine the legitimacy of a measure, such as in *Pope & Talbot v. Canada* and *GAMI v. Mexico*. The *Pope & Talbot* tribunal held that a measure would not be a violation of NT if it has “a reasonable nexus to rational government policies which (i) do not distinguish on their face or de facto, between foreign-owned and domestic companies – in other

⁷⁶ *Siemens Award*, *supra* note 7, para 81.

⁷⁷ *SGS Award*, *supra* note 7, para 116.

⁷⁸ *Saluka Award*, *supra* note 7, para. 300.

⁷⁹ *Ibid.*

⁸⁰ *Plama Award*, *supra* note 7, para 130.

words, non-discriminatory –, and (ii) do not otherwise unduly undermine the investment liberalising objectives of NAFTA.”⁸¹ And the tribunal of *GAMI* stated that “plausibly connected with a legitimate goal of policy [...] and [...] applied neither in a discriminatory manner nor a disguised barrier to equal opportunity”⁸² with the emphasis of a clear connection between the legitimate policy objective and the policy in question.

3. Need for Flexibility and Security Exceptions

The above analysis brings the necessity for flexibility in IIAs to the fore. While the right of a host state to regulate has existed in IIAs based on the police powers doctrine, the use and the scope of the doctrine has been highly limited. This could be due to the characteristic of customary international law in that its scope is not conducive to the evolution and changes unless any international organisation explicitly delineates the scope. While security matters lie within the scope of the police powers doctrine, as the doctrine has not efficiently played as a security exception that exempts a host state from paying compensation, we need to explore security exceptions in IIAs, distinct from the police powers doctrine. For understanding essential security interests in IIAs, as discussed in Chapter 2 above, the Argentine cases became a cornerstone. Before the Argentine cases, the scope of security exceptions in IIAs remained questionable since, traditionally, the concept of national security mainly focused on military security between countries – that is, dealing with international military issues.

To provide grounds for an exceptional measure against an imminent and serious threat, necessity under customary international law has common features with security exceptions in IIL. The ILC interpreted necessity in Article 25 of Draft Articles on Responsibility of States for Internationally Wrongful Acts and acknowledged that necessity would embrace various interests more than military interests.⁸³ However, in the realm of IIL, before the Argentine cases, there was no ruling or interpretation on the scope of essential security interests. Therefore, the Argentine cases were the first to acknowledge the weight of other aspects of security interests apart from military security interests in line with the ILC’s approach to necessity. Despite the recognition

⁸¹ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, April 10, 2001, para 78.

⁸² *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, November 15, 2004, para 114.

⁸³ See further Chapter 2.2.4. The Tribunal Awards.

of various types of security, the tribunals of the Argentine cases did not provide the types of measures that could be legitimised on the grounds of security.

The legitimate scope and types of measures for essential security interests could vary depending on the types of (i) investors, (ii) investments and (iii) the host state's situation. Some measures could be preventive (*ex-ante*), and others could be aimed at addressing a threat or a crisis (*ex-post*). In the first case, a host state can implement different regulations applied to a different type of investor, whether a GCI or a corporate investor. The justification of the different treatment would be based on the concern that a GCI could use its economic influence in the host state as political leverage. In the second case, regulations could differ between Greenfield investment (new establishment of investment) and a merger/acquisition. The government of host state, in general, would not intervene in Greenfield investment unless the law explicitly restricts a particular industry. But regarding a foreign takeover of, *inter alia*, a strategic industry or a critical infrastructure,⁸⁴ even countries with a free-market system tend to adopt a more restrictive approach.⁸⁵ Measures based on such an approach can be a government's intervention in the takeovers of specific industries, including critical infrastructure or national champion industries or implementation of further restrictions for the protection of public interests. However, these measures can often be claimed, by an investor, to be expropriation if they affect the investor's interests adversely or the violation of NT.

The last case is regarding the host state's situation such as societal distress, a military attack and an economic crisis. For example, during a financial crisis, a government might decide to limit the transfer of funds/capital because, without particular measures, the situation can bring about unrecoverable repercussions. Therefore, socio-economic and political issues drive the necessity for a government to adopt a new measure so as to maintain the society and pursue sustainable development based on stable infrastructures and socio-economic system.

⁸⁴ This encompasses industries like transport, telecommunications, water and electricity supplies and health.

⁸⁵ This is further illustrated in the US's intervention in Dubai Ports World's take-over bid over American ports.

The effective ways to implement IIAs have been widely examined with the consideration of flexibility since too strict, inflexible and unchangeable terms of agreements do not lead to achieving the mutual benefits of both parties.⁸⁶ This is because enforcing the initially agreed terms without certain flexibility during a crisis including economic and financial exigencies can easily encourage the host state to violate its commitments, which automatically impairs the interests of foreign investors. By concluding and ratifying an IIA, on the one hand, a host state expects an increasing or continuous influx of foreign direct investment. On the other, the state faces a decreased regulatory space given its commitments under an IIA. Excessive constraints on the host state's sovereignty may backfire in that they may lead the host state to nullify the treaty, if it reaches the conclusion that keeping the commitments by no means benefits its interests. The tension between abiding by commitments and introducing a flexibility mechanism signifies the conflict between the legal and political security and stability and preparation for unforeseeable events in the future.

However, it is not possible to create agreements which take every contingency into account. Any attempt to do so will lead to increasing drafting and negotiation costs.⁸⁷ Anne van Aaken points out the conflicting interests: between (i) encouraging parties concerned to respect contractual commitments with the goal of ensuring mutual benefits and (ii) expecting contractual terms still valuable even in case of and after uncertainties.⁸⁸ Drafting a contract/agreement with 'hard' language – which has little room for further interpretation – can increase certainties for both parties. Yet, considering risks and uncertainties in the future, such languages rather are not preferable by both parties. To achieve mutual benefits, Aaken argues that tribunals should aim to strike the optimal balance between ushering international commitments and securing flexibility. Yet, concurrently, tribunals should be deterred from interpreting contractual terms too broadly to avoid putting the system per se at stake.⁸⁹

⁸⁶ F. Ortino, 'Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges', *International Centre for Trade and Sustainable Development*, June 2015; see also, van Aaken, 2009, *supra* note 19.

⁸⁷ Van Aaken, 2009, *supra* note 19, p. 516.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* p. 508.

3.1. The Effectiveness of IIAs and Need for Flexibility

Considering the necessity of flexibility, exceptions in IIAs can play a pivotal role in accommodating flexibility, which can help IIAs attain legitimacy in the long term. While increased liberalisation in IIAs has taken place in parallel with opting for the negative list approach⁹⁰ and broader coverage, governments feel the necessity to create safeguards for them to secure regulatory space in order to pursue their policy objectives for public interests, public order or essential security interests, otherwise violating the commitments. On the one hand, the IIL system has worked effectively due to direct sanctions, i.e. compensation, and indirect sanctions, such as a negative impact on the reputation of a host state, which can play a more effective role in influencing a host state's action.⁹¹ This is because a host state is wary of gaining a reputation for breaching international obligations.⁹² On the other, when foreign investors expect increased predictability in the host state's legal framework and governance for foreign investment, the predictability should not refer to the status of freezing the whole legal framework, thereby causing no changes. Rather, it should indicate no instability in the direction of governments' policy objectives. This is because a host state should be entitled to introduce new rules to address social needs. When a state decides to conclude an international agreement, it gives up certain policy space, and it may also be required to make amendments to domestic policies and make significant commitments, as opposed to the socio-economic development goals.

While a state should make changes in its current policy by entering into an international treaty, whether economic or not, thereby having its policy space reduced, it still retains its policy objectives for public interest and its economic development. Imposing onerous requirements and obligations on host states could dissuade host states from generally ratifying an international agreement. For that matter, exceptions have played a role in enhancing flexibility in international agreements, given that contracting parties need to embrace "flexibility" mechanisms which provide host

⁹⁰ A negative list in this case connotes that foreign investment is allowed in all sectors unless it is explicitly precluded.

⁹¹ A. Guzman, *How International Law Works: A Rational Choice Theory*, New York, Oxford University Press, 2008, Chapter 3. Reputation.

⁹² R. E. Scott and P. B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law*, Cambridge University Press, 2006, p. 68. Scott and Stephan discussed the effectiveness of soft law in international law in reference to reputational effects.

states with policy space which enables states to reflect on the commitments and the agreements.⁹³ Such policy space is necessary because ambitious international agreements tend to require states with onerous modifications, amendments on their conduct, or policy directions.⁹⁴

The UNCTAD Framework pointed out in ‘Policy Options for International Investment Agreements’ that broadening the exception can reduce certainty for foreign investors and increase the possibility that such exceptions can be abused.⁹⁵ However, Pelc revealed that there had not been much abuse of escape clauses in the case of the GATT-WTO.⁹⁶ This may be due to the existence of the adjudicative body, Dispute Settlement Body (DSB) of the WTO. An analogy can be drawn between the case of WTO and that of IIAs, in that a host state will not abuse the clause due to the presence of international tribunals such as the ICSID and *ad hoc* proceedings. As stated above, countries are wary of introducing a new rule given that a foreign investor can claim that the rule is indirect expropriation and this can result in a substantial financial risk for the government in case a tribunal finds in favour of the foreign investor.

Besides, Helfer argues that where tribunals interpret the rights of foreign investors in IIAs broadly by referring to the preamble which often provides the objectives of IIAs, i.e. the protection of foreign investors and foreign investment, this leads to “overlegalising”.⁹⁷ And this “overlegalising” can aggravate the asymmetry between foreign investors and host state. Helfer also points out that either the case where a government is required to make many amendments on its policy or the case where tribunals read the agreements expansively, i.e. overlegalising, can rather encourage host states to violate their agreement, because the cost for observance becomes too

⁹³ See further L. R. Helfer, ‘Exiting Treaties’, *Virginia Law Review*, vol. 91, no. 7, 2005, p. 1586.

⁹⁴ K. Raustiala, ‘Form and Substance in International Agreements’, *American Journal of International Law*, vol. 99, no. 3, 2005, pp. 613-614.

⁹⁵ UNCTAD, ‘Policy Options International Investment Agreements’, Part A. Post-establishment, 5. Public Policy Exceptions, <http://investmentpolicyhub.unctad.org/ipfsd/policy-options-ii-a> (accessed June 4, 2018).

⁹⁶ K. J. Pelc, ‘Seeking Escape: The Use of Escape Clauses in International Trade Agreements’, *International Studies Quarterly*, vol. 53, 2009, p. 353.

⁹⁷ L. R. Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’, *Columbia Law Review*, vol. 102, no. 7, 2002, p. 1834.

burdensome considering the benefits they can get.⁹⁸ Although one measure taken by a state may be recognised as direct or indirect expropriation, the amount of compensation payable is another issue which needs to be agreed on by both parties, i.e. a host state and a foreign investor. Tribunals will retain the authority to interpret clauses – rights and obligations, widely or narrowly. The controversy as to whether IIAs provide sufficiently open regulatory space to host states is still ongoing and sparks more discussion about possible means in order to strike a balance. Therefore, it is imperative to devise a means to increase the flexibility in regulatory space to some extent for host states for justifiable policy objectives, including public order, public interest and national security.

Some commentators claim that tribunals in the IIL system tend to be open to legitimate policy objectives whereas general exceptions provided in GATT Article XX are a closed list.⁹⁹ And an illustrative list of exceptions enables tribunals to interpret the provision broadly in terms of legitimate government policy. It is argued that a general language allows tribunals to take a balanced approach between the interests of investors and policy-space of host states for legitimate policy, which is broader than general exceptions.¹⁰⁰ On the contrary, Andrew Newcombe questions the applicability of general exceptions into IIAs during the eighth Annual WTO conference. He notes that even if states have added general exceptions with the aim of securing flexibility in their regulatory power for public interests, it still remains questionable how tribunals will interpret such exceptions.¹⁰¹ Newcombe states that since the appearance of general exceptions in IIAs is quite rare, it may increase regulatory space for host state if parties propose an expressive intention with an *effet utile* approach by tribunals.¹⁰² He also explains the possibility that the inclusion of general exceptions in IIAs can lead to rather less regulatory flexibility with the example of the *Model International Investment Agreement for Sustainable Development* drafted by the International Institute for Sustainable Development (IISD), by noting that the IISD intentionally did

⁹⁸ L. R. Helfer, 'Flexibility in International Agreements' in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, 2013, p. 176.

⁹⁹ N. DiMascio and J. Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin', *American Journal of International Law*, vol. 102, no. 1, 2008, p. 77.

¹⁰⁰ *Ibid.*

¹⁰¹ A. Newcombe, 'General Exceptions in International Investment Agreements', Draft Discussion Paper, Prepared for *BIICL Eighth Annual WTO Conference*, May 13-14, 2008, London, p. 4.

¹⁰² *Ibid.* p. 8.

not include general exceptions given the concern that such exceptions in IIAs could be interpreted by the tribunals too narrowly, which can bring about even more limitation on regulatory power of host states.¹⁰³

The OECD 2004 report also demonstrated that the new trend of BIT had taken a broad approach, such as a broadened definition of investment and investors including investment controlled by one of contracting parties, i.e. government-controlled investment.¹⁰⁴ The report shows that while foreign investors desire “transparent and predictable rules” which are applicable to their investments,¹⁰⁵ governments increasingly resort to various exceptions relating to taxation, essential security, the protection of human health, the environment and the preservation of natural resources, and measures for the financial sectors.¹⁰⁶ To achieve legitimate policy goals, states have incorporated more public interest safeguards in IIAs, *inter alia*, the regulatory power of government to pursue objectives regarding the environment, health, safety, etc. The preambles of the Japan-Korea BIT¹⁰⁷ and the Japan-Vietnam BIT¹⁰⁸ underline that encouraging investment in exchange for undermining the standard of protection in the environment or labour law should be deterred. Notwithstanding, the previous section illustrated that a host state could not effectively pursue its policy objective due to the burden of the compensation especially and the recourse to the exceptions is less likely to be determined as legitimate where the protection of property rights are greatly emphasised. Moreover, even if a tribunal recognises that the political, societal and economic circumstances were sufficiently serious to permit the host state to take a measure to tackle the circumstances, the tribunal could question whether the measures taken did not exceed the level of what is considered “necessary”. More importantly, the meaning of necessary can be controversial.

Escape clauses can play a role as a certain degree of flexibility in case of unpredictable events in international agreements by delaying obligations on agreement temporarily

¹⁰³ See A. Cosbey, ‘The Road to Hell? Investor Protections in NAFTA’s Chapter 11’, in L. Zarsky (ed.), *International Investment for Sustainable Development: Balancing Rights and Rewards*, London: Routledge, 2012.

¹⁰⁴ OECD, 2004, *supra* note 20, p. 145.

¹⁰⁵ *Ibid* p. 151.

¹⁰⁶ *Ibid* p. 176.

¹⁰⁷ Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment (2002).

¹⁰⁸ Agreement between Japan and the Socialist Republic of Vietnam for the Liberalization, Promotion and Protection of Investment (2003).

in order to recover from a certain shock facing a country. Escape clauses allow a government to address emergency situations with the proviso that such a measure taken on the grounds of escape clause should be temporary and indiscriminate. The escape clauses give a host state a leeway to explore for its benefits in case of exigencies and simultaneously broadens the scope of lawful actions. Thus when a state utilises an escape clause, it violates the agreement *de facto*, but complies with it *de jure*. Hence, an escape clause exists on the boundary between soft law and hard law.¹⁰⁹ Although some authors including Koremenos argues that the inclusion of escape clauses in international agreements leads to decreasing obligations in the agreements,¹¹⁰ an international agreement with a high threshold or rigid rules can dissuade states from concluding such an agreement, and may well leave a state with nothing, but a choice to withdraw from the agreement.

On the contrary, where an agreement is too lax, a state can be more resilient to crisis, but it can easily abuse this flexibility, which may damage the credibility of escape clauses as exceptions. Scholars have argued that in order to avoid this dilemma and to enhance the efficiency of escape clauses, a country which invokes such clauses should pay “some kind of a cost.”¹¹¹ Such cost can play a preventive role as compensation to those who are negatively affected as a result of invoking an escape clause. Thus, a state can bargain with other states over the amount of compensation and calculate a cost and a benefit to determine whether it needs to invoke a clause or not. Countries have an incentive to abuse an escape clause for various reasons such as protectionism; hence, some kind of cost is essential as a penalty.¹¹² However, Krzysztof J. Pelc criticises this view in that it is somewhat too ideal since it was found that governments tend to avoid compensation rather than discuss optimal compensation.¹¹³ Pelc believes that lowered obligation by invoking an escape clause can be counterbalanced by other obligations

¹⁰⁹ K. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’, *International Organization*, vol. 54, no. 3, 2000.

¹¹⁰ B. Koremenos, ‘Bringing More Precision to the Three Dimensions of Legalization’ Paper presented at the *European University Institute*, Fiesole, Italy, 2004.

¹¹¹ P. Rosendorff and H. Milner, ‘The Optimal Design of International Trade Institutions: Uncertainty and Escape’, *International Organization*, vol. 55, no. 4, 2001, p. 831.

¹¹² K. J. Pelc, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law*, Cambridge University Press, 2016, p. 38.

¹¹³ K. J. Pelc, ‘Seeking Escape: The Use of Escape Clauses in International Trade Agreements’, *International Studies Quarterly*, vol. 53, 2009, p. 350.

not included in the exception list – he called this as a trade-off.¹¹⁴ Kravis, however, notes that, to some extent, an inclusion of escape clause is inevitable in international agreements for the sake of further liberalising international market.¹¹⁵

3.2. Current Problems in Exceptions in IIAs and Security Exceptions

Escape clauses, discussed above, have the conditions that the measure should be rather temporary to curtail continuing the impairment on rights of other parties which are negatively affected by the measure. However, the strict conditions and the tribunals' approach driven by the preamble of BITs can prevent host states from derogating from its obligation, especially the obligation to compensation in the case of expropriation, thus decreasing the efficacy of escape clauses. Moreover, current escape clauses may not reflect the changing circumstances and newly created issues in society.

In the Argentine cases where the Argentine government took an emergency measure during the economic crisis, such as *CMS*, *Enron* and *Sempra*, the tribunals interpreted essential security interests in line with necessity in customary international law by applying the same elements for invoking a necessity claim. In *CMS*, the tribunal held that invoking essential security interests should comply with the conditions for invoking necessity under customary international law.¹¹⁶ The *Enron* tribunal also held that the term “essential security interests” is not defined, so the tribunal should refer to a state of necessity to interpret, and that essential security interests “becomes inseparable from the customary law standard when it comes to the conditions.”¹¹⁷ Although Article 25 of Draft Articles on Responsibility of States for Internationally Wrongful Acts emphasises that a state may invoke necessity in order “to safeguard an essential interest from a grave, imminent peril”,¹¹⁸ it does not provide that legislation adopted by a state has to be temporary on the grounds of essential security interests.

¹¹⁴ Ibid p. 351.

¹¹⁵ I. Kravis, ‘The Trade Agreements Escape Clause’, *The American Economic Review*, vol. 44, no. 3, 1954.

¹¹⁶ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, September 2005, para 373.

¹¹⁷ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, May 22, 2007, para 334. It may be necessary to rethink whether necessity and security exceptions have the same thresholds for invoking a plea, and whether while the notion of national security evolves, the meaning and the scope of necessity also develop.

¹¹⁸ Article 25 of International Law Commission (ILC), Draft Articles on State Responsibility, U.N. Doc. A/56/10 and Corr.1, 2001.

Even if a measure is taken on the grounds of security including risk, the essence of the clause does not change, that is, ‘exceptions’.

Although the Argentine cases highlighted the type of measures, aimed at tackling an emergency situation, where a broadened security is applied in IIAs, there are two potential types of measures which can affect foreign investment on the grounds of national security: during normal times and during a crisis or emergency period. Although the Argentine cases were close to the latter, a potential measure for a security purpose during a normal time can be possible. This is because ‘a risk’ which has not been materialised can lead to an unrecoverable repercussion without an adequate measure. Therefore, it may not be feasible to provide the benchmark as to whether a security issue is a risk which has a highly destructive potential or not. Thus, a country continually needs to reflect on its security report to specify what type of threat belongs to a category of risk, and what type of threat falls within the group of existential threats.¹¹⁹

While the discussion regarding *ex-post* measures addresses compensation issues – whether a foreign investor is entitled to full compensation for loss caused by a state measure, *ex-ante* measures have different characteristics. A specific distinction should be made between normal times and emergency situations. Where a threat has not materialised (thus, only where risk exists), a government may not be entitled to take a regulatory measure which does not result in the obligation to pay compensation. The measures during the stage of pre-investment and during a normal time cannot be legitimised on the grounds of necessity since there may not exist an imminent threat. Yet, host states have intervened in takeover transactions, evidenced in the Dubai Ports World case, and have renewed the list which restricts foreign investment in specific industries from particular types of investors.

The role of risk in the realm of security policy should not be overlooked, but it requires higher thresholds since a threat is not materialised. This signifies that the interest which might worsen once the risk becomes a real threat should be catastrophic. Regulation on public health and the environment can be included in this category.

¹¹⁹ O. Wæver, ‘Securitization and Desecuritization’, in R. D. Lipschutz (ed.), *On Security*, Columbia University Press, 1995.

Notwithstanding, it would not be easy for tribunals to discern whether a measure is purely driven by the concern to preserve the environment and protect the public health or involves the intention to impinge on foreign investment.

4. Conclusion

This chapter explored challenges to accommodating regulatory space of host states and examined the asymmetric relationship between host states and foreign investors. The chapter briefly discussed the rights of foreign investors in order to demonstrate what they are entitled to and what types of treatment a host state should provide to foreign investors. Some clauses with regards to the rights of foreign investors in IIAs have some room for judicial interpretation since such clauses do not demarcate the scope of the clauses such as FET.¹²⁰ The chapter further examined how tribunals interpret these rights, based on whether a sole-effect criterion or other factors are taken into account. The ongoing controversy whether a tribunal should adopt a sole effect criterion or take into account the purpose of the measure has also increased the uncertainty in determining the legality of regulatory actions. Given the increasing emphasis on property rights as a constitutional right, a host state has been expected to pay compensation to foreign investors, where the latter's rights are impinged on by a host state's regulation. This may imply that the rights of foreign investors could outweigh the purpose of measures.

In the meantime, it is difficult to estimate whether a measure is tantamount to expropriation or falls within the ambit of the police powers. Despite this growing concern regarding the obligation to pay compensation – or the right to compensation from foreign investors' perspective – host states have sought to facilitate their regulatory space by explicitly specifying an exception that “non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations” as provided in the US 2012 Model BIT and Canada's FIPA. However, it is not clear how the insertion of such a clause can help host states secure their regulatory space and further exempt host states from paying compensation. To be a legitimate expropriation, the measure concerned should have public interest

¹²⁰ See *supra* note 75; UNCTAD, 2012, *supra* note 12, p. 7.

consideration. However, despite the public interests purpose, a host state cannot avoid the obligation to pay compensation. In other words, the police powers of state arising out of sovereignty have been diminished by the narrow interpretation of tribunals. Where the definition of national security is survival, then the right to regulate stemming from sovereignty should be one of the requisites to achieve national security. Therefore, an overlap exists between police powers and national security to some extent.

Moreover, it is true that stringent rules without a certain level of flexibility may encourage a host state to violate its international commitments rather than adhere to them. This is because the costs to comply with the commitments are more than the benefits gained out of the commitments. Accordingly, this underlines the importance of flexibility, i.e. the role of escape clauses, for the legitimacy of international agreements. Therefore, it is imperative to examine whether such clauses are in effect viable and applicable in spite of the high thresholds for invocation and to deliberate the ways to make such clauses remain justifiable, where necessary.

CHAPTER 6

Legal Recommendations and Policy Reforms

1. Introduction

Host states have endeavoured to secure their policy space against possible limitations imposed by the ratification of international agreements. As shown in the previous chapter, the police powers doctrine has been used insufficiently, and current escape clauses have not played an effective role as derogations.¹ Additionally, foreign investors have sought to find effective ways of protecting their assets and their rights in host states, which include broader interpretation of host states' obligations, especially the obligation of fair and equitable treatment.² Such interpretation can connote imposing obligations on host states, which go beyond their expectations and what they are pledged to grant.

For this reason, the broadening of national security can help balance the interests of host states and foreign investors by allowing a host state to take measures to address various security matters. In addition to striking a balance between the conflicting interests, the broadening can contribute to achieving coherence in understandings of national security among host states' policies as well as between host states and foreign investors. For instance, while a foreign investor would claim that the scope of security should be limited to military security, host states could extend the scope of security much broader. Conversely, approaches to security adopted within one country could even vary. For example, although one country's national security strategy report covers diverse security issues, its foreign investment policy might only highlight the military aspect of security.³ To be more specific, while a security strategy report

¹ See Chapter 5, especially on Chapter 5.2.2. Regulatory Space Accommodated by the Right to Expropriate and Police Powers.

² See further Chapter 5.2.1. The Rights of Foreign Investors and footnote 75 regarding the definition of fair and equitable treatment.

³ And the opposite case is also viable, i.e. foreign investment policies may cover security interests beyond military security whilst security reports mainly discuss military security. It is true that essential security interests/national security is often intentionally left undefined, given the difficulty of defining the notion and delineating its scope; thus such incoherence may not seem clear. Notwithstanding, the analysis in Chapter 2 and Chapter 3 demonstrates that such complexity exists. For example, the recent US strategy reports mainly emphasised military security and military security-related matters such as space security while they did not provide concrete policy targets or strategies regarding other types of security by simply making remark on the role of critical infrastructure (see further Chapter 3.2.1. United States). However, as evidenced in Chapter 3. Security in Foreign

addresses a variety of security issues, such as economic prosperity and cyber/space security, foreign investment policies may discuss more limited scope of security – for instance, an investment act can stipulate that foreign investors are not allowed to acquire a company or invest in a sector which is closely related to military security. Thus, although the differences are more evident between foreign investors and host states, certain discrepancies still exist among different policies at the domestic level. The divergences in the conceptual understandings lead to a question as to how various approaches within one country can be harmonised in order to achieve more coherence in the security-related policies.

The broadening of security may be seen as an attempt to favour a host state's regulatory power over the interests of groups affected by such broadening, that is, foreign investors in this case. However, the broadening can be used to bring about the mutual benefits of both host states and foreign investors/home states as long as a government attempts to mitigate the possibility of discretion and arbitrary decisions towards foreign investors. As discussed in Chapter 1, security scholars have highlighted the necessity of broadening, but simultaneously they have avoided the securitisation of every issue. Instead, the ultimate goal of securitisation is to de-securitise a securitised issue, thereby bringing this issue within the area of normal politics (Chapter 1.2.2). Furthermore, scholars also argued that the scope of national security is no longer limited to military security, but it has been recognised that different security matters should be included in this scope (Chapter 1.2.2, 1.2.4). Therefore, de-securitisation and securitisation are in progress, and the concept and scope of national security are evolving. This means, at some point, policy-makers might not recognise terrorism as an issue which needs securitising but could address it within the political sphere.

While recognising that the notion of security is subject to evolution, this thesis also argues that, depending on the type of foreign investor, i.e. a corporate investor, a GCI, and an individual investor, the role, breadth and influence of military security vary. Accordingly, when dealing with individual foreign investors, particularly under a

Investment Policy and Government-controlled Investment, the US intervened in a few takeover transactions of companies closely related to critical infrastructure on the grounds of national security. For example, the US's inhibition on the acquisition bid for the US energy firm, Unocal, by the Chinese national oil company, CNOOC, due to the risk of technology leakage.

citizenship-by-investment programme, it is most likely that only military security concerns are taken into account. A myriad of security matters, such as societal security, economic security and political security, can be allowed for in the policies to cope with corporate investors and government-controlled investors. In addition, a host state may well impose more stringent rules on GCIs on the grounds of national security. This is especially so where a GCI wishes to invest in certain sectors of the economy which are closely related to critical infrastructure. This is because it is believed that GCIs are more likely to become a threat to military or societal security given the way GCIs are governed, i.e. a home state's government can be involved in decision-making for a strategic purpose other than just for profit-maximisation.

In addition, it is also true that the concept of national security plays a different role in each type of investment and investor. In the case of corporate investors, the main issue is whether a security measure is an indirect expropriation entailing compensation or a legitimate regulatory measure, which does not result in compensatory obligation. In the case of GCIs, – although a GCI can also be subject to a regulatory measure, thereby being able to file a claim against a host state, unless the BIT between the host state and the home state excludes a GCI as an investor – the protection of strategic industries and critical infrastructures is highlighted. In most cases, it is accepted for a government to intervene in a take-over transaction where the industry in question has a public interest.

The last case, that is, an individual foreign investor under a citizenship-by-investment programme, is very distinctive in that the broadening of national security plays a minor role. In other words, the broadened concept of security is not so much applicable in this context, and the scope of national security is unlikely to cover economic, political and societal security. This can be contrasted with the cases of corporate foreign investors and GCIs, which demonstrate that national security has been evolving and its scope and meaning have been broadened so that different types of issues are incorporated as security matters, such as economic security, societal security, political security and so forth. Therefore, each type of investor incorporates (retains) a unique notion of security, given the fluid nature of the security, whether multifaceted or simple. Thus, this chapter seeks to suggest some policy recommendations and

directions a host state may adopt for the purpose of relating with different types of investors.

Regarding the relationship between national security and foreign investment, a host state faces a number of critical considerations, irrespective of the type of foreign investment. Such critical considerations are as follows:

- (i) While a host state wishes to enjoy the benefits flowing from the influx of foreign investment, the state also wishes to secure its regulatory space. However, if the host state takes a measure on national security grounds (in a broadened sense), this can dissuade foreign investors from locating their investment within the host state due to the possibility of being subject to such a measure.
- (ii) Given the importance of critical infrastructures, a host state needs investors who can keep innovating and maintaining the industry efficiently, but the host state concurrently has the concern that transfer of the ownership of such industries can decrease its societal security. However, this does not mean that domestic companies will guarantee societal security, either.
- (iii) A government implementing a citizenship-by-investment programme needs the inflows of cash and investment in the country; but, in exchange, it does not wish to compromise its security.

It is imperative to acknowledge the broadening of security, which encompasses military, economic, political and societal security given that it can help a host state to secure its policy space regarding security. Conversely, foreign investors should be aware of potential security measures in advance. However, it is also noteworthy that demarcating the scope of security is as pivotal so that the regulatory space in this regard does not expand in the excessive/arbitrary manner, which can help mitigate the dilemmas (i-iii) aforementioned.

Therefore, to deter excessive/arbitrary measures on the grounds of security, this chapter contributes to delimit (partitioning) the scope of security, by distinguishing the concept of security from other terms and suggesting the way the notion of security should be developed. Chapter 2 and Chapter 5 compared the notion of security with necessity and public order, both of which are widely examined along with national

security/essential security interests, as evidenced in the Argentine cases.⁴ Notably, Chapter 5 shed light onto the conceptual framework of security, distinct from necessity insofar as they exist under the different systems, that is, IIL and customary international law, respectively. Therefore, this chapter recommends how the definition of security should be undertaken, distinct from public order and necessity in concept and application to tribunals and contracting parties for IIAs.

2. General Recommendations for Host States in relation to Theories: from Securitisation to Demarcation

2.1. Recommendations in relation to Securitisation

In Chapter 1, I argued that most of the Realist security scholars have criticised the broadening of national security. In their opinion, the concept of broadening national security would give rise to incoherence. In other words, they claimed that the inclusion of many sectors, such as economic security and socio-political security, can lead to incompatibility between security issues, i.e. which security should be prioritised if there is a conflict.⁵ Where a policy objective for achieving economic security may cause political insecurity, it can be questionable which security issue should take precedence. However, by placing emphasis solely on military security, the Realist School reinforces the gap between security studies and security demands in reality. Moreover, all security issues have multifaceted dimensions; military insecurity can be caused by economic tensions; societal insecurity can also stem from long-standing local grievances or a failing government which lead to political insecurity. Amid a state-centric view to security, the emphasis on societal security, independent of national security, can help complement the state-centric understanding of national security, as the Copenhagen School argues.⁶ Thus, national security should encompass

⁴ See Chapter 2 for the analysis of the Argentine cases. The Argentine government argued that the emergency measures taken should be legitimised on the grounds of public order and essential security exceptions in the BIT between the US and Argentina, whereby the government could be exempt from its obligation to pay compensation to investors affected by the measures. The tribunals drew upon the requirements/conditions for invoking necessity under customary international law in order to assess the legality of the measures on the grounds of security.

⁵ See Chapter 1.2.1. The Realist School; S. Walt, 'The Renaissance of Security Studies', *International Studies Quarterly*, vol. 35, no. 2, 1991.

⁶ See Chapter 1.2.2. The Copenhagen School and Securitisation to see the argument of the Copenhagen School that societal security can play a complementary role to state (national) security.

societal security on its term as a constituent of national security. This means that a state should be allowed to take a measure against a threat to societal security.

In this regard, the broadening of national security could enhance a state's regulatory space as the state can take a measure against diverse security threats in addition to a traditional threat, i.e. an inter-state military threat. However, despite the increased latitude of regulatory measures on the grounds of national security, the legitimacy of security measures can be always questioned. Therefore, to gain the legitimacy for measures motivated by security interests, host states need to set a specific duration for the measures in question. This could be extended further depending on the progress of addressing a securitised matter. As pointed out by Ole Wæver, securitised issues need to be de-securitised because the aim is not to securitise a politicised matter, but to de-securitise a securitised issue by placing it in a category where policy-makers can redress issues within the normal politics (Chapter 1.2.2).

The emphasis on the broadening of national security in IIL should not be interpreted as an attempt to induce an arbitrary measure against foreign investors or to foster a burgeoning trend of unfair treatment or indirect expropriation towards foreign investors. **Nor should the broadening of national security signify an unlimited expansion of the concept. Instead, the scope of national security needs to be adjusted, and the process of securitisation should be followed by de-securitisation.** If a host state arbitrarily takes advantage of national security, not only will the legitimacy of the measure be absent, but also the credit of the country will be tainted as a host country, thereby being disadvantaged in the international investment market. Where a state accepts the broadening of national security in its regulatory framework, it is recommended that this intention be explicit in documenting security-related policies in order to prevent the scope of security measures from expanding in an excessive and arbitrary manner.

Moreover, host states also have to pay considerable attention to securitisation because the securitised issues may not correspond to the initial plan concerning securitisation (Chapter 1.2.3). Therefore, with the goal of refraining from undertaking excessive and arbitrary securitisation, a government should examine the securitisation process so as to ensure the scope of securitised matters remains within the demarcated boundary.

Besides, as highlighted by the Copenhagen School and the Paris School,⁷ regardless of the genuineness of a threat, an enunciator, in general, a policy-maker, announces by a speech act that a threat is existing so that he/she can take an appropriate measure against such a threat. Although securitisation can provide a rationale to justify emergency measures on the grounds of security, securitising issues may well lead to increasing insecurity among the audience⁸ in that a government takes abnormal actions whereby citizens sense that their security is under a specific threat. As the Constructivist School argued, if knowledge, in this case, security is created for someone and for some purpose,⁹ the intention and the aim of implementing security measures per se should be questioned. Therefore, a tribunal should take a closer look at the measures and assess if there is any underlying rationale behind the emergency measures because, without a policing institution, wrongful securitisation can be undertaken.

2.2. Recommendations in relation to Investment Risk¹⁰

The notion of risk has been incorporated in security and investment policies, but it can also threaten the legitimacy of the broadening. While shedding light on the future development of security policies, risk studies examined the idea that the concept of risk could be efficient in dealing with future events that can be catastrophic.¹¹ However, at the same time, due to ‘potential’ catastrophic effects, the notion of risk can lead to increasing the possibility of discretionary decisions in drafting security policies based on the risk governance, i.e. which risk is more likely to occur and has potential to become more catastrophic once it is realised. The reason why it has significant room

⁷ Both the Copenhagen School and the Paris School discuss securitisation, but their foci are distinctive in that the Copenhagen School highlights the role of enunciators in securitisation and de-securitisation as an ultimate goal, while the Paris School takes a closer look at the process of securitisation by examining whose interests take precedence over others, and how audiences react to securitisation. See further Chapter 1.2.2. The Copenhagen School and Securitisation and Chapter 1.2.3. The Paris School.

⁸ See Chapter 1.2.3. regarding the Paris School’s argument on in-securitisation.

⁹ R. W. Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’, *Millennium: Journal of International Studies*, vol. 10, no. 2, 1981. See further Chapter 1.2.4. The Constructivist School.

¹⁰ This section mainly discusses the implications of risk in the context of corporate foreign investors and GCIs. This is because, as will be shown in the following section 4.3, the notion of risk is applicable in the context of individual investors under a CIP in a very limited manner compared to the other two types of investors.

¹¹ See Chapter 1.3. Risk on how the notion of risk has been suggested as a more efficient way of achieving security by contemplating future events based on scientific knowledge and calculation.

for discretion is due to the difficulty to calculate risk and devise an appropriate measure to prevent the risk from becoming a real threat, because risk arises from uncertainty, and absolute certainty cannot be achieved. Moreover, as Ulrich Beck points out, risks emerge, only when they are defined or articulated by institutions which retain the authority of disseminating knowledge.¹² Therefore, although risk governance is based on scientific research and previous experiences, governments announce a priority list of security values, based on the way risk is perceived by them and the institutions which define as such and introduce measures according to the priority list, which denotes serious subjectivity. Thus, it remains questionable how far a host state can take a measure on the grounds of risk.

Furthermore, the notion of “unimaginable implications” justifies exaggerating the possibility of risk by policy elites rather than underestimating risks,¹³ in order to avoid the responsibility of undoing. For example, if the risk became a real threat, and no actions were taken prior to the occurrence of threat, those policy elite would be accused of taking no actions against the risk. In response to the possibility of overestimating risks, the primary lesson in the risk analysis should be how to deal with consequences of the measures on the grounds of risk, i.e. compensation. **A government should establish a clear objective for its measures with the aim of mitigating risks so that the measures cannot be used as a means to another objective.**

For example, in the case of the US, it is true that risk estimation, risk assessment and risk governance have become a pivotal part of policy-making since the 9/11 terror. The trend of the US security policies has become more preventative with emphasis on risk assessment and anticipatory governance.¹⁴ Preventive actions are adopted based on a scientific premise¹⁵ – for instance, suggested by a research centre – that preventive action is required to mitigate or remove a specific risk which can develop into a serious

¹² Here, such institutions include the mass media, legal systems and scientific research centres; see further, Chapter 1.3. Risk and U. Beck, *Risk Society – Towards a New Modernity*, London: Sage, 1992, pp. 22, 23.

¹³ H. G. Brauch, ‘Concept of Security Threats, Challenges, Vulnerabilities and Risks’, H.G. Brauch et al. (eds.), *Coping with Global Environmental Change, Disasters and Security*, Hexagon Series on Human and Environmental Security and Peace vol. 5, Springer-Verlag Berlin Heidelberg, 2011, p. 101; see further Chapter 1.3. Risk on how uncertainty plays a role in security and risk policies.

¹⁴ See Chapter 3.2.1. on the development of the US Security Strategy Reports.

¹⁵ Scientific knowledge and research based on past experiences often legitimise such actions due to its ‘credibility’.

threat to security. However, the premise can also be prejudiced and misrepresented. Because anticipatory governance often involves impinging on interests of some group of people, a host state should be able to demonstrate why such governance is imperative; for example, without appropriate measures/policies, unrecoverable repercussions could occur. Otherwise, the concept of risk can play a detrimental role in the context of national security by jeopardising the legitimacy of security measures.

By the same token, the UK's security policy also highlighted the importance of a risk-based approach.¹⁶ Preventive, precautionary and pre-emptive actions may not be legitimate on their merits, but by acknowledging the broader scope of national security, a host state can be equipped with resilience and preparedness, which can help the host state react promptly. On the other hand, military security remains more important than other types of security matters, such as energy security. Considering the UK's strategy report, energy security lies at Tier 3 whereas military security and issues related to military security are Tier 1 and Tier 2, respectively. This trend shows that while the concept of threat broadens in the sense that risks are understood as falling within the scope of threats, the scope of security issues in the national security strategy report remains narrow to the extent that the report mainly covers issues closely related to military security. As aforementioned, this type of development with the emphasis on a risk-based approach can increase the possibility of arbitrary measures because a visible threat does not exist, which makes it difficult to contrive appropriate policies and measures, no more than necessary. **Therefore, governments should periodically review their risk policies to examine the adequacy of the policies and curb excessive measures which go beyond the required level of implementation.**

Although countries have increasingly incorporated the risk-based approach in their security policies, the status of risks in IIAs is questionable – unless it by no means exists – insofar as no provision in IIAs allows for the possibility that a host state can invoke a measure on the grounds of risk. Whilst the definition of essential security interests in IIAs was never agreed upon, what is more questionable is whether the risk

¹⁶ See Chapter 3.2.2. European Countries, especially on the UK's national security strategy with the tier-based system.

could fall within the meaning of ‘the protection of its own essential security interests’ in IIAs.

Depending on whether the risk could be included in this scope or not, there are two potential scenarios:

- (i) If the risk could be included in the scope of essential security interests, a measure against the risk may be legitimised on the grounds of security, hence no obligation for a government to pay compensation.
- (ii) If the risk does not fall within the scope of essential security interests, any measures to tackle/address the risk should entail an obligation for a host state to pay compensation for loss caused by the measure in question because it would be regarded as an indirect expropriation or a violation of fair and equitable treatment and so forth.

However, before determining whether to encompass risk within the scope of essential security interests, the definition and scope of essential security interests in the context of IIAs should be established. If the definition draws upon necessity under customary international law – although this thesis does not support the idea that the interpretation of international investment law should not entirely draw upon general international legal principles, i.e. necessity – there should be a grave, imminent peril. This denotes that provided that risk is not a threat, there would not be a visible imminent peril, which disqualifies risk from falling within the scope of essential security interests. On the other hand, if the definition is agreed upon by contracting parties and specified in IIAs, the potential status of risk would be different. For example, contracting parties can state that nothing in the IIA shall be construed to preclude a party from applying measures it considers necessary to prevent a potential threat from developing into a threat in their preparatory work.

Regardless of which interpretation contracting parties prefer between whether drawing upon or being independent of the principle of necessity, **contracting parties should endeavour to specify the definition of essential security interests and types of threats – i.e. if a visible and imminent threat should take place.** However, it is likely that contracting parties would agree that the scope of exceptions should not arbitrarily expand and that the notion of risk retains the possibility of leading to

arbitrary measures. With this idea in mind, where a government implements a measure which aims to remove or minimise risk, thereby impinging upon the rights and interests of foreign investors, the government is unlikely to be exempt from the obligation to compensation for causing indirect expropriation.¹⁷ This implies that where foreign investors in a certain sector – closely related to national security with high risk – wish to invest in a host state, a host state should be more cautious of authorising their investments if the host state considers that it is highly likely that a certain sector would be more subject to measures based on risk assessment.

2.3. The Peculiarity of Security Matters

While the recommendations as to securitisation and the role of risk can apply to every state, as demonstrated in Chapter 3, countries might perceive, in a different manner, the pre-requisites of national and international security. Some countries could believe that economic aspects of security are relatively immaterial compared to military security because they have already achieved a certain level of economic prosperity and stability, especially in the case of developed countries. On the contrary, developing countries could argue that their economic security should be enhanced for the survival of their populations because economic insecurity is likely to cause other types of security issues. For example, with low economic stability, countries are more exposed to other types of security threats, such as wars and insurgencies.¹⁸ This approach may legitimise a measure aiming for a certain level of societal stability on the grounds of essential security interests in IIAs. Therefore, a host state should endeavour to respond to genuine security demands, thereby allowing for the evolution of the concept of security in parallel with the development of threats, core values and security demands in society.

Furthermore, the types of measures on security grounds could be distinctive in response to security demands in developing countries from security demands in developed countries, provided that the Third World's security interests significantly differ from the ones of developed countries. Therefore, to achieve economic security,

¹⁷ See Chapter 1.3. Risk for further discussion of governance based on risk.

¹⁸ See further Chapter 1.2.4. The Constructivist School; K. Booth, 'Security and Emancipation', *Review of International Studies*, vol. 17, no. 4, 1991, p. 318.

developing countries need to redress widespread economic distress and chronic famine. In this case, it is not clear how to delineate the scope and type of legitimate actions on the grounds of national security insofar as, when invoking essential security interests, the legitimate intention could be questioned. That is, whether to enhance economic situation of developing/underdeveloped countries or only to redress a crisis. This is because, in most cases, a security measure is recognised as an emergency measure against a crisis, which implies that a threat should appear suddenly rather than having chronically existed. In response, a government should take an immediate measure to tackle it. However, if a developing country announced that it would implement a policy to tackle economic distress and chronic famine on the grounds of security, those, who argue that a security measure should only apply to an abrupt situation, would denounce such a policy and might claim that a security policy should not be utilised to achieve other goals such as economic development in the society. However, if a certain level of economic development is regarded as a prerequisite to socio-economic security, it can be controversial whether a measure with the aim of tackling chronic famine can be legitimised on the grounds of security in case it causes a loss for foreign investors. **Therefore, a government should clearly define the target/aim/purpose of measures pursued.** Such clarification is due to the possibility that a particular measure could be disguised as a security measure to achieve another policy goal, such as trade protectionism.¹⁹

When introducing a security measure, a government should explicitly specify ‘for whom and for which values’²⁰ the security measure in question is implemented; in

¹⁹ For instance, in the early 1980s, the US imposed import restriction against Japanese semiconductor goods for the protection of the domestic semiconductor producers on the grounds that the protection of the US semiconductor industry was pivotal to national security. However, during this period, the Japanese industry gained its international competitiveness over the US producers. It was argued that the measures taken were trade protectionism, disguised as a security-related measure. If a critical industry, which is closely related to national security, loses its competitiveness not only at the international level, but also at the domestic level, a government could face such situation. Therefore, it is controversial whether a measure taken with the aim of protecting a domestic critical industry by imposing a restriction on a foreign producer/investor can be legitimised. See further M. Okamura, and K. Futagami, ‘A National-security Argument for Trade Protection’, *Journal of Economics*, vol. 68, no. 1, 1998, p. 39.

²⁰ D. A. Baldwin, ‘The Concept of Security’, *Review of International Studies*, vol. 23, 1997, p. 13. As argued in Chapter 1, the two specifications, i.e. security for whom and security for which values can help governments to set security targets (see further Chapter 1.4.).

other words, whether the measure is (i) for an individual, society, or a state and (ii) for economic stability considerations, political objectives, or eradication of poverty.

To identify the beneficiary of security policy, a government should clarify its policy objective to the extent that the policies are implemented to secure its populations, for example, those who are suffering from chronic famine or violence or those against organised crimes. This is one of the ways to demarcate the scope of security and security policies in order to deter arbitrary expansion of security on this matter. To determine which values a security measure is aimed at protecting, firstly, a government should accept that the notion of security is multifaceted. This is because the ultimate national security cannot be achieved by focusing on one type of security. It is true that where a war was ongoing or was about to break out, the essential security concern would lie in national defence from military threats. However, this does not denote that the importance of economic security would decrease in parallel with increasing significance of military security. This is because national defence could be achieved based on economic stability and economic instability would give rise to another societal distress which threatens national security.

3. Recommendations for Law and Policy Reforms on Conceptual and Analytical Dimensions

While the previous section suggests a way in which a government understands the notion of security in parallel with the evolution of security – i.e. security has become multifaceted – this section argues that security should be disentangled from public order and necessity justifications.²¹ It is true that in reality, there can be an inevitable overlap between public order and security interests in the application. First of all, necessity is a principle under customary international law. In IIAs, while public order and national security/essential security appear explicitly, neither of the clauses makes reference to necessity. This means signatory parties did not intend to read such clauses by drawing upon the principle of necessity and the conditions for invocation.

²¹ All of the three justifications – that is, necessity, public order and national security – allow for measures which can be legitimate for the purpose of protecting an ‘essential interest from a certain threat.

As one has argued before, where every issue becomes a security matter, the meaning of security will be trivialised.²² Hence, a host state should be vigilant of how an issue becomes securitised and deter excessive securitisation in order to retain the legitimacy of security. As I have argued in this thesis that clear broadening can achieve mutual benefits for both host states and foreign investors, it is imperative to underline what can be gained by the broadening of security. While a host state can accommodate its policy space in relation to its essential security interests in an explicit manner, it needs to refrain from taking an arbitrary security measure. With the aim of preventing this, a host state should have a clear understanding of which issue should be incorporated within security and what should be excluded in the category. In particular, a host state should not be confused between public order and security interests. It is possible that those interests could be intertwined – such as the situation where a military coup occurs in a country, which endangers democracy, a shared social value that is fundamental for public order and, concurrently, gives rise to political and societal instability which engages a security concern. However, if a situation solely relates to public order, such as social disturbances, a host state should not take a measure against it on the grounds of security. For example, if a foreign investor is convicted of money laundering, or if a code of conduct of a foreign corporation in the host state is the violation of human rights, a host state should regard this issue as public order, separate from national security interests.

International adjudicative bodies have confirmed that governmental measures ought to be the least trade restrictive, to minimise the loss.²³ But countries as defendants might adopt the most effective measures to tackle the emergency. The tribunals recognised that necessity should be close to indispensable²⁴ while public order does not contain the meaning of imminent urgency in contrast to national security. Although the traditional understanding of national security underscores that an imminent threat should exist to take a security measure, the emergency of risk in security studies has drawn keen attention and played an important role in security policies, as potential repercussion where risk becomes realised is too catastrophic.

²² Walt, 1991, *supra* note 5.

²³ WTO, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R, December 11, 2000, para 164.

²⁴ See further Chapter 2.2.5 Necessity.

Traditional understandings of security, consisting of military security or issues only related to military security, do not allow a government to protect critical infrastructure because of national security. And risk, even military risk cannot be included in the scope of traditional national security since there exists no existential threat, but rather a potential risk.

The recourse to necessity, without taking into account the dynamics between the customary international legal principle, i.e. necessity, on the one hand, and treaty exception, i.e. essential security interests, on the other, can occasion misinterpretation of the treaty exception. The broad scope of its operation – meaning, this can be applied in international law in general – would logically make the requirements of invocation more stringent than a specific area of law such as IIL. Tribunals should also evaluate whether the exception is self-judging or not. Therefore, **without an express link between a treaty provision and a customary international principle, tribunals should not apply operative requirements of customary international law in interpreting treaty provisions.**

The table below compares necessity, essential security interests in the US-Argentina BIT and “necessary” in Article XX and XXI of GATT.²⁵

	Necessity under customary international law	Article XI. Essential Security Interests of the US-Argentina BIT	“Necessary” in Article XX (a), (b), (d) and Article XXI (b), (c) of GATT
Self-judging?	The ICJ seemed not to acknowledge any margin of appreciation to the states in <i>Gabcikovo-Nagymaros</i> ²⁶	Does not specify, hence uncertain. “This Treaty shall not preclude the application by either Party of	Yes. Especially, Article XXI(b) states that nothing in this Agreement shall

²⁵ See further Chapter 2.2.5. Necessity, which discusses “necessary” in Article XX(a), (b), (d) and Article XXI(b), (c) of GATT.

²⁶ *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*, ICJ GL No. 92, 1997.

	<p><i>Project and Oil Platforms</i>.²⁷</p> <p>Also, the ILC commentary on State Responsibility does not specify any further explanation on whether it is self-judging or not.</p>	<p>measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to ...</p> <p>or the protection of its own essential security interests” (emphasis added)</p> <p>Therefore, there exists some room for a tribunal to interpret.</p>	<p>be construed “to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”</p>
Sector	Having generality with wide application, which resulted in high thresholds for operative tests.	International investment law specific, which concerns dynamics between a host state and a foreign investor.	International trade law specific, which governs inter-state trade issues.
Connection with other legal principles	The ILC’s commentary did not specify any reference to other provisions in defining an “essential interest”.	Does not refer to any other legal provisions for jurisprudence.	“...identifies the source of obligations ‘for the maintenance of international peace and security’” in line with the UN Charter

²⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003.

Types of issues subject to government measures	The ILC's commentary considers a myriad of issues such as military, economic and political issues to fall within the scope. ²⁸	Rather than static, an adjudicator retains some discretion to interpret the exception. The Argentine tribunals noted that the exception encompasses political, economic, societal and military concerns.	Traditional, inter-state security (mostly military and defence issues)
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Table 4 Necessity vs. Essential Security Interests vs. Necessary

Jürgen Kurtz argues that international treaties offer their independent exceptions to allow for flexibility so that host states can take measures on the grounds of public interest. Kurtz sees the reliance on customary principles of necessity where interpreting necessity as an attempt to seek a “rejoinder of the criticism that international investment treaties are a self-contained regime at international law”²⁹, independent of a wider meaning of international legal framework.

In *CMS*, the tribunal analysed necessity first, and then considered the treaty provision, i.e. essential security interests. The *Sempra* and *Enron* tribunals showed a similar tendency to the extent that they combined necessity under customary international law and essential security interests in the BIT between the US and Argentina. This means that the tribunals applied the operative tests for necessity in determining the legality of measures on the grounds of essential security interests. As Kurtz notes, this way of conflating the customary rules and treaty provisions rendered the treaty exception ineffectual due to the highly stringent requirements for invoking necessity. The necessity and capability for tribunals to take an interpretative methodology are also found in the *Nicaragua* case³⁰ where the ICJ stated that customary international rules

²⁸ The commentary of Article 33 in the ILC “in a grave danger to the existence of the State itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, the ecological preservation of all or some of its territory, and so on.” See further, Report of the International Law Commission on the work of its thirty-second session, vol. 2, Part 2, A/35/10, 1980, p. 35.

²⁹ J. Kurtz, ‘Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis’, *International & Comparative Law Quarterly*, vol. 59, no. 2, 2010, p. 327.

³⁰ *Nicaragua v. United States of America*, Merits, Judgment, ICJ Reports, 1986.

did not overlap with the treaty provision – in this case, Article 51 of the Charter of the United Nations – and remained to exist alongside the treaty provision. Therefore, if the tribunals for the Argentine cases had not drawn upon the conditions for necessity when determining the legality of Argentine government’s measures on the grounds of essential security interests, the independent system for international investment law could have been achieved.

Moreover, the Argentine cases tribunals, apart from the *Continental* tribunal,³¹ did not explicitly discuss the difference between public order and essential security interests. On the contrary, the *Continental* tribunal held that “[p]ublic order relates to fundamental societal value, such as morality, while security interest refers to the international security of the State in relation of external threats” by accepting that public order can be a synonym for public peace.³² Therefore, the tribunal found that actions necessary to maintain/restore peace and the normal life of society and to deter disturbances, such as looting and riots for civil peace and the legal order, shall fall within the application of public order.³³ A similar approach can be found in the public order exception of the WTO GATS Agreement. Footnote 5 to Article XIV(a) states that “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”³⁴ The WTO Panel examined the concept of public order in the *Internet Gambling* case, and concluded that the notion of public order “can vary in time and space, depending upon a range of factors including prevailing social, cultural, ethical and religious values.”³⁵ The Panel accepted that certain discretion of WTO member states in defining public order by ruling that “Members should be given some scope to define and apply for

³¹ The *LG&E* tribunal also seemed to pay attention to the term “public order” by stating that “All of these devastating conditions – economic, political, societal – in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest.” *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct 3, 2006, paras 231–237. Yet, the tribunal did not interpret public order, distinct from security interests unlike the *Continental* tribunal.

³² *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, September 5, 2008, para 174.

³³ *Ibid.*

³⁴ General Agreement on Trade in Services, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, in World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 325, reprinted in 33 ILM 81, 1994, Art. XIV(a).

³⁵ WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services* – Report of the Panel, WT/DS285/R, Nov 10, 2004, para 6.461.

themselves the concepts of public morals and public order in their respective territories, according to their own systems and scales of values.”³⁶ By drawing upon a dictionary definition, the WTO Panel defined public order as a concept aiming to preserve the fundamental interests of a society which involves the maintenance of the rule of law.³⁷ Adopting this approach, Kurtz suggests that coping with “disruption that threatens the normal functioning of a State” can be related to a State’s measure on the ground of public order.³⁸ **Therefore, more coherent guidelines by tribunals can clarify the scope and requirements for invoking public order, distinct from invoking security interests.**

4. Institutional Recommendations

This section makes recommendations on dealing with each type of foreign investor: namely, a corporate foreign investor, a government-controlled investor, and an individual foreign investor under a citizenship-by-investment programme.

4.1. Corporate Foreign Investors

The characteristics of corporate foreign investors are clearly different from those of GCIs and individual foreign investors. While GCIs may well have public concerns to the extent that their investment mainly focuses on critical infrastructures, such as energy sectors and transportation, and is either governed or controlled by a foreign government, private corporates are more likely to aim to maximise their profits. Therefore, in principle, corporate foreign investors would be subject to less stringent rules than GCIs.

Foreign investments are divided into two groups, Greenfield investment and takeover investment by as mergers and acquisitions. In the case of Greenfield investment, foreign investment by corporate investors tends to draw less attention since it is not expected that a transfer of knowledge, such as know-how, in a company will take place, although a host state still can require foreign investors to establish investment

³⁶ Ibid.

³⁷ Ibid para 6.467. And the Panel concluded that organised crime which could potentially stem from internet gambling would be against public order whereas the prevention of underage gambling or gambling addiction would concern public morals (Ibid para 6.469) – the term, which was defined as “standards of right or wrong conduct” by a community. (Ibid para 6.465.)

³⁸ Kurtz, 2010, *supra* note 30, p. 361.

with the proviso of prior authorisation in the case of investing in a certain group of critical infrastructure or strategic industries. In the same manner, even in the case of a takeover, a government is less likely to intervene in such a transaction unless the industry in question has the feature or play a role to serve a public interest and essential security interests. Regarding corporate foreign investment, the most eminent role for national security is in determining whether a government, which takes measures during a crisis or emergency period, can derogate from its obligation to pay compensation for the loss occasioned by the measures on the grounds of national security or essential security interests on IIAs. As shown in the Argentine cases in Chapter 2, measures can range from changes in contract terms to denomination from dollars to its own currency – in the case of Argentina, Argentine pesos. Therefore, the question is whether loss caused by those measures, as foreign investors argue, should entitle a foreign investor to have adequate compensation by invoking indirect expropriation and fair and equitable treatment or whether a government can derogate from its obligation due to the emergency.

Regarding this, BIT contracting parties should explicitly introduce the procedural rules in the treaty or their model BITs. **It should clearly delineate the scope of national security and the requirements for invoking national security in order to derogate from their international and national commitments.** This suggestion can apply to foreign GCIs in the sense that GCIs should also take into account the possibility of broadening the scope of national security. In other words, a host state may impose diverse regulations on GCIs on the grounds of national security.

As mentioned in Chapter 5, there are two cases where a host state can take a measure on the grounds of national security: *ex-ante* and *ex-post*. As an example of the latter, the government of Argentina took measures such as pesification in response to its economic/financial crisis. In other words, the division/distinction between *ex-ante* and *ex-post* is made based on whether a crisis or a great exigency occurs. **As the concept of risk has appeared and been discussed in conjunction with security, risk should not be overlooked in making legal recommendations.** Although, technically speaking, there was no case before the ICSID regarding a regulatory measure on the grounds of risk, there are many cases where a state has intervened in transactions, in particular take-overs, which are mainly found in cases of GCIs, as Chapter 3 discussed.

Yet, if some sectors are open to foreign investment, and the only reason why a take-over transaction is denied or intervened in by a host state is for the potential ramifications related to security ensuing from the transaction, this may lead a foreign investor to file a claim before tribunals.

Increasingly, the definition of investors began to encompass a government in IIAs. This means that where an IIA does not differentiate treatment between corporate investors and GCIs, **a tribunal must decide whether a GCI is entitled to the same status as a corporate investor.** Otherwise, to avoid granting this discretion to tribunals, contracting parties should explicitly state whether a GCI would be treated in a particular manner, distinct from a corporate investor.

Especially during a financial crisis, a host state may resort to some measures including “limitation of current payments and capital transfers”, “rescue/reorganisation of selected national financial institutions”, and “sovereign default and debt restructuring, currency redenomination”.³⁹ Such tension between foreign investors and host states over a measure on the grounds of public interests has existed and will take place in the future due to the compensation issue.⁴⁰

Foreign investors should grasp the scope of public interests in order to calculate risks before deciding to locate investment. From the perspective of foreign investors, where a governmental measure was implemented, they would be willing to claim that the measure is an indirect expropriation so that the host state cannot avoid the obligation to compensation whereas the host state would wish to claim that the measure in question would fall within the ambit of national security interests.

Therefore, the central issue in relation to national security between corporate foreign investors and a host state is whether a measure is tantamount to expropriation. In other words, this denotes that when a host state takes a measure – which adversely affects foreign investment – with the aim of protecting security interests, the conflict between the host state and foreign investors is whether a host state has the obligation to

³⁹ G. Sacerdoti, ‘BIT Protections and Economic Crises: Limits to their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity’, *ICSID Review*, vol. 28, no. 2, 2013.

⁴⁰ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Actions in the Public Interest – the Concept of Proportionality’, in S. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, 2010, p. 77.

compensation or can be exempt from such an obligation on the grounds of essential security interests in IIAs.

From the perspective of host states, **it is also imperative to understand the scope of discretion which can be legitimised for the protection of essential security interests, i. e. a type of measures and a type of industries subject to such measures.**

In other words, this is a question about whether a government retains the authority to dictate one industry has national security interests so that the industry is entitled to special protection. In the case of Argentina, the industry as such was the transportation and the distribution of gas. Without measures in such an industry, such as delaying the negotiation to increase tariffs, other industries and society could face more serious problems, whereby the crisis in the country as a whole could become worse. Again, this begs the question if a government can only take a measure for the industries with particular social needs. However, it can also be challenging to establish the meaning of industries with particular social needs. This is because some countries have champion industries which are distinct from critical infrastructure – for example, some countries have fostered a manufacturing industry for economic development; and this might not fall within the scope of critical infrastructure. But if the industry in question became the essential industry and produced the majority of jobs in the country, it could be difficult to simply exclude champion industries from the list of industries with particular social needs.

Moreover, no agreement has been established regarding the characteristic of essential security interests. If an essential security interest is an overriding factor,⁴¹ a host state is less likely to be reluctant to take a measure when the requirements are satisfied. Otherwise, even though a host state finds it indispensable to implement a measure against a crisis or a situation which needs redressing, the state would have to take a

⁴¹ Chapter 5 discussed whether the doctrine of police power could be an overriding factor. While this debate has never reached agreement, those who uphold that this doctrine should not be influenced by other elements argue that there should exist an overwhelming public interest or the measure in question should be indispensable in order to have the measure fall within the scope of police powers. See further Chapter 5.2.2. Regulatory Space Accommodated by the Right to Expropriate and Police Powers and B. Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law', *Australian International Law Journal*, vol. 15, 2008, pp. 272-273; A. S. Weiner, 'Indirect Expropriation: The Need for a Taxonomy of Legitimate Regulatory Purposes', *International Law Forum*, vol. 5, no. 3, p. 170; M. Sornarajah, *The International Law on Foreign Investment*, 4th edn., Cambridge University Press, 2017, p. 531.

variety of factors into account, such as the estimated amount of money the state potentially could pay to foreign investors as compensation when the essential security interests claim is rejected. Also, contracting parties should also define “essential”⁴² as absolutely necessary; extremely important, fundamental to the nature of something. Thus, as argued in Chapter 2,⁴³ contracting parties need to be aware of whether there is a clear difference between national security and essential security interests, and then adopt a term which represents their intention.

In the same vein, in drafting IIAs, first of all, **a government should establish their preference on specific issues, such as whether the article of essential security interests or national security should be self-judging and whether they wish to define “essential”**, as discussed in Chapter 2. In the case of the US 2012 Model BIT, Article 18: Essential Security is a self-judging clause, stating that “... measures it considers necessary”, whereas Article XI of the BIT between the US and Argentina may not be self-judging, “the application by either Party of measures necessary for the...” Where not self-judging, a host state government should bear in mind that the decision on what constitutes a measure as necessary can be made by others to gain legitimacy. The issue arose because the clause of Essential Security Interests in the BIT between the US and Argentina was not self-judging, which accords significant discretion to adjudicative bodies so that they could decide whether the situation required measures. Besides, even if the clause was self-judging, tribunals, depending on the severity of the situation, could question legitimacy. Thus, they could hold that the circumstance did not involve any security matters or the measures taken gave rise to damages more than necessary. This implies that a self-judging clause creates room for tribunals’ discretion, which could be against the intention of contracting parties.

⁴² If a state retains its regulatory space to define what is essential, even if essential security interests is not a clear self-judging clause, the clause can have the effect of self-judging to some extent.

⁴³ Chapter 2 argued that considering the terms “essential security interests” and “national security” do not coexist in one sentence, they share the same scope of situations. Provided that national security has been replaced by essential security interests, contracting parties have been increasingly inclined to adopt the term “essential security interests”. In Chapter 2, I also argued that adding “essential” to security can be also construed as an attempt to gain additional shields – this can be understood as a result of speech act. Accordingly, as a state declares that a measure is absolutely necessary for essential security interests, others cannot challenge the legitimacy of measures. Removing “national” from national security can be regarded as eliminating the clear demarcation between national security and international security. See further Chapter 2.2.3.; and UNCTAD, ‘The Protection of National Security in IIAs’, UNCTAD Series on International Investment Policies for Development, New York and Geneva, UN, 2009, (UNCTAD/DIAE/IA/2008/5).

Therefore, to avoid the confusion on the feature of essential security interests in IIAs, **contracting parties should explicitly state the intended effect of security interests in preparatory works during the negotiation. They should also endeavour to establish the requirements for invoking essential security interests.**⁴⁴

4.2. GCIs

It can be sensitive to strike a fair balance between facilitating national security and guaranteeing the protection of foreign investment by, inter alia, GCIs. This is because restrictions imposed on GCIs can be more stringent than other corporate foreign investors given the concern that political reasons mostly motivate decisions of GCIs.

Whereas national security mostly plays a role as *ex-post* – that is, once an economic or financial crisis takes place – with respect to corporate foreign investment, GCIs are more likely to be under scrutiny *ex-ante*, that is, before the realisation of risk or potential threat. In other words, a host state takes action or intervenes in the process of takeover of the domestic industry. Although scrutiny of GCIs is mainly *ex-ante*, it remains possible that a new discovery in affiliation between a GCI and the government which controls the investment in decision-making – the decision is made based on other reasons rather than profit maximisation – can become a ground for a government to intervene in the investment market. It is necessary to emphasise host states' interpretation of strategic industries and critical infrastructure. Despite the similarity in countries' definition of critical infrastructure, countries have different levels of openness, which is evidenced by the Dubai Ports World cases. And the openness can vary, depending not only on the countries but also on the types of industries.

To minimise a host state's intervention in any types of transactions taken by a GCI, GCIs should always have the burden to prove that there is no political motivation in making decisions.

Regarding dealing with GCIs, four types of countries are considered below:

⁴⁴ This can also help achieve the demarcation between necessity and security interests in IIAs as the essential security interests clause in IIAs has never referred to necessity to draw upon the requirements for necessity. Hence, they should be interpreted, as two separate concepts.

- (i) a country which does not specify any restriction subject to GCIs;
- (ii) a country which imposes a specific restriction on GCIs in particular sectors;
- (iii) a country which restricts all GCIs (complete prohibition, unless authorisation is granted, for instance, Iceland); and
- (iv) countries which require GCIs reviews. Mostly, in the (ii) case, the particular sectors where GCIs cannot invest are critical infrastructures – communications, transports, energy sectors.

The rationale for applying a different treatment to GCIs stems from their potentials to cause market-distorting impacts. This is because their finance can derive from diverse sources, not just profits, and to be operated based on a political decision, which can impair public interests. However, as examined in Chapter 3, it is not predictable for a government to decide whether a foreign company has any other intention than the pursuit of company's profits and to determine if the home state of the investor can influence a foreign investor. Compared to a private foreign investor, the proximity between GCIs and a home state government is inevitably close. Therefore, as illustrated in the example of Gazprom, – a Russian Energy Company stopped the supply of gas to Ukraine for a political purpose – the operation of industries where a foreign investor invested can be negatively affected by a political and diplomatic tension between the home state and the host state.

While it is imperative to contemplate the potential effects of GCIs, as the UK is apparently aware, in decision-making for foreign investment policy, taking into account a public interest or national security concerns can easily taint transparency and predictability, which leaves some possibility of arbitrary decisions. The question is how a government can prevent this so that the justifications of security and public interest can continue.

Most governments have stipulated laws to restrict foreign takeovers of particular industries, and such industries are mainly related to national defences, such as cryptosystems. However, as Germany amended its legislation, the government can restrict foreign acquisitions (from outside the EU and the EFTA) if the acquisition is considered to jeopardise public order or security or to pose a threat, which is not limited to cryptosystems. This shows that the type of industry, a take-over of which

could potentially jeopardise public security/order and public interests of the society, can extend beyond national defences.

Whereas Germany places EU/EFTA member states in the same category as German citizens, France diversifies the categories in more detail: non-EU investor, EU investor, and French investor, who are all subject to different rules. This shows that from each country's perspective, the level of risk is different. It is more effective to diversify the type of investors and different rules which each type of investors are subject to, to establish a precise policy goal and prevent foreign investors from being subject to arbitrary treatment. One may argue for more consistency in the standards. If consistency existed, the possibility of arbitrary measures could also decrease in that everyone is subject to the same legislation. Furthermore, a principal rationale for such different rules is based on the belief that a foreign investor could use its ownership against national interests due to the possibility that a foreign investor could be connected to a foreign government. Notwithstanding the above, it is not clear whether a domestic corporate will have less risk than a foreign corporation in this regard because all the corporates have the same goal, i.e. profit-maximisation. In this manner, differentiating between a domestic private company and a foreign private corporation may not seem visible. Proponents for restricting a foreign investor from investing in a sector would argue that domestic investors would pose fewer risks in that they could not file a claim before any international tribunal whereas foreign investors may well bring a case to claim for compensation if their investments were negatively affected by host state's policies.

Without express provisions such as periodic security checks, the sole concept of national security, by making use of a national security review, magnifies the latitude of discretion given to the authority. And this is evidenced in the case of Canada where SOEs are subject to more stringent rules while the Minister retains the authority to embark on a national security review.

In the regulations which GCIs are subject to with regards to, *inter alia*, critical infrastructure, security has two main features in the foreign investment policy: one for the traditional security concept, such as cryptosystems, military security and the other for the newly incorporated security interests, energy security and societal security.

4.3. Individual Investor under a CIP

The scope and types of national security issues are distinctive for individual foreign investors since individual investors are less likely to retain sufficient potential risk to a host state's economy. Instead, an individual, who is naturalised under a citizenship-by-investment scheme, can be subject to a higher level of vigilance from the host state given the suspicion that the individual having plural citizenship could represent a risk to the host state's national security.

This type of investors are subjected to two stages of security procedures: before and after naturalisation. First, in the application process, individual investors can be rejected on the ground of national security, due to either restricted nationality or criminal records. After being granted citizenship, naturalised individuals are still subject to revocation by periodic checks or international or bilateral sanctions on the country of origin of the investors. For instance, such citizenship can be susceptible to changes in diplomacy, international order and the relationship between the host state and the country of origin. *Ex-ante*, more discretion and arbitrary decisions can play a role for national security reasons while, *ex-post*, a host state should have a clear and legitimate reason to revoke citizenship.

It is crucial to delineate the scope of national security in the application and revocation processes of citizenship in citizenship-by-investment programmes. It is also important to understand potential security problems which can arise from the programmes. Among the grounds for revocation, certain types of crimes, especially financial crimes, such as money laundering, may lead a naturalised citizen to lose his/her citizenship. **Yet, this type of crimes should be regarded as separate from the withdrawal of citizenship on the grounds of national security unless money laundering is used to finance international terrorism. This is because a private financial crime may not be directly related to national security matters and does not affect the survival of the population in the country.**⁴⁵ In this sense, money laundering can fall within the scope of public order rather than national security in that public order refers to shared norms and social values which are fundamental for the legal order, indicating

⁴⁵ Also, many citizenship-by-investment programmes stipulate the criteria of money-laundering crimes and national security separately in the provisions for ineligibility/eligibility and revocation. This means host states do not recognise them in the same category.

“normal and peaceful situations in the public sphere, patterns of values that are important in a community of citizens.”⁴⁶

The role of national security in this context is quite limited compared to the one in the case of corporate foreign investors and GCIs. As Chetcuti Cauchi Advocates have pinpointed, the revocation of citizenship based on national security⁴⁷ is based on military and diplomatic security, such as treason and involvement in transactions with national enemies or with terrorist groups.

The term “national security” often appears in the programmes. But it is also the case that the host states have failed to provide a precise definition of national security. Therefore, it is recommended that clear guidelines be established in this area. With the goal of preventing any security risks, periodic checks may be necessary, and this should be explicitly stated so that an applicant is well informed of what type of checks they will be subject to once naturalised. Although naturalised citizens would be treated similarly as a citizen by birth, this is not practically possible, given that where a naturalised citizen committed a serious crime, he/she can be deprived of his/her citizenship, which does not apply to a citizen by birth.

The Cyprus programme, “B.3 Terms and Conditions of the Cypriot scheme” stated that a naturalised investor is subject to a periodic check to ensure he/she complies with all the requirements in relation to a residence and investment. However, unless a naturalised investor repudiates his/her citizenship after a certain period, the discretion to revoke citizenship is retained by the authority. This raises the possibility of arbitrary measures. Thus, **schemes should provide sufficient procedural and substantive legislation regarding how and why citizenship can be revoked under such a scheme, thereby minimising arbitrary decision-making.**

Mostly, the countries implementing the citizenship-by-investment programme do so because of lack of domestic and foreign capital. From their perspective, an immediate

⁴⁶ R. de Lange, ‘The European Public Order, Constitutional Principles and Fundamental Rights’, *Erasmus Law Review*, vol. 1, 2007.

⁴⁷ The grounds for revocation which are not directly related to national security includes (i) the failure to fulfil the requirement to purchase or lease a residency (property) or to retain investments and (ii) the involvement in a certain activity “which is seriously prejudicial to the vital interests to the host state.” See further Article 10. Deprivation of Citizenship on the Maltese Citizenship Act (CAP. 188), Individual Investor Programme of the Republic of Malta Regulations (L.N. 47 of 2014).

and a specific economic benefit outweighs security concerns, of which the host states should be aware. Thus, a host state trades security with the opportunity to receive an influx of cash and financial capital necessary for economic development and diversification of industries. Therefore, while the economic benefits of such programmes are high, it is not reasonable to deny any potential security issues which could arise out of the programmes. **Hence, a host state should calculate the economic benefits and potential risks to public policy, public order and national security; then they need to revise the scheme or abolish it.**

The denunciation of the Irish scheme points out that a citizenship-by-investment programme should be equipped with enforcing stringent rules and transparency in the application process. Besides, with the goal of deterring corruption, host states should publish regular reports on whether the funds are spent as envisaged for economic and social benefits of the country.

Moreover, citizenship-by-investment programmes are criticised for lax controls, such as allowing a citizen from certain countries to avoid international economic sanctions and an individual to commit illicit financial activities. Therefore, host states should ensure thorough background check during the application process and monitor the financial transactions of naturalised citizens.

4.4. The Comparison among the Types of Investors

The analysis regarding the effect of the broadened concept of security on the different types of investors necessitates the conclusion that the notion of security is somewhat fluid. It can be simplified, but it is often multifaceted and complex. Certain types of security can be thick or thin, depending on the type of investor. The table below illustrates how active each type of security may become, depending on the type of investor. Regarding corporate investors, each type of security equally takes part, as evidenced in the Argentine cases where the tribunals found economic security/societal security as equally crucial to military and political security. On the contrary, in the context of GCIs, although the significance of economic and political security would be maintained at the same level to the case of corporate investors, the implications of

military and societal security become augmented.⁴⁸ Many GCIs tend to invest in critical infrastructures which serve public interests in society and can directly influence national defences, such as energy supplies and transportations. This presents the concern whether investments by GCIs could be operated not for the purpose of profit-maximisation, but for inter-political purpose. Thus, a host state could become more sensitive to GCIs in order to protect military and societal security, thereby imposing more stringent rules and requirements on GCIs. While the notion of security is multifaceted in the case of corporate investors and GCIs, it becomes simplified in the context of individual investors under a CIP. This is because, as aforementioned, the scale of investment is rather trivial to affect national economy or society and the revocation of citizenship on the grounds of national security focuses on military and diplomatic security, such as treason and link with terrorist groups.

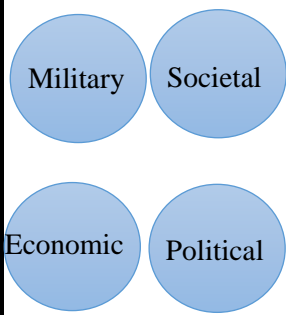
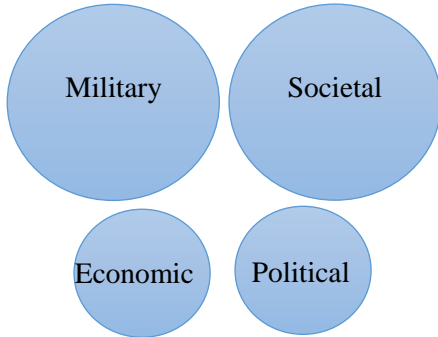
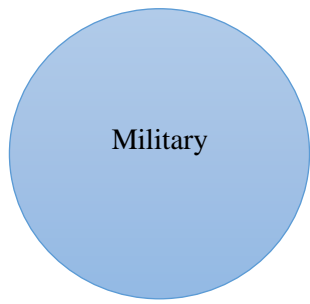
Corporate Investor	Government-controlled Investor	Individual Investor
		

Table 5 The gravity of types of security by investor

Therefore, as the notion of security becomes contextual and flexible, depending on the type of investors, security should not be understood as a stagnating concept.

⁴⁸ Here, I make a separation between military and political security in the sense that political security would denote domestic political affairs whereas military security encompasses the international political/military concerns. This is because international tensions could often increase the level of national defence and implementing economic sanctions. For example, during the military tension between Russia and Ukraine, Gazprom, a Russian Energy Company, stopped supplying gas to Ukraine for political purpose. Therefore, although it has the economic, and societal aspects of security, this case could be more closely related to military security. (However, it is true that clear separation/distinction in this context is often improbable because security matters are likely multifaceted.)

5. Concluding Reflections

As discussed in the previous chapters, the concept of national security varies because each country has different political and economic environments, and thus unique security concerns. In the past, as security matters were deemed inter-national, rather than intra-national, the sole emphasis on military security failed to take into account peculiar security demands and the evolution of security. While various security strategy reports began to deal with the broadened concept of security, the status of security – essential security interests – in IIAs was not clearly defined. Therefore, the recognition of economic crisis as a security matter in IIAs, by the Argentine cases tribunals, played the role of bridging the gap between IIAs and national policies in terms of national security/essential security interests.

As aforementioned, I argue that broadening of security has taken place in the context of international investment and is necessary to serve security demands. Yet, host states should refrain from expanding the scope of security in the arbitrary/unlimited manner and encompassing other public interests claims, such as necessity and public order, within the scope of national security. It is true that differentiating those terms can be challenging insofar as the terms necessity, public order and national security share common features. However, they also have their distinct features.⁴⁹

As the figure below shows, there are overlaps between necessity and security and between security and public order; and often clear distinctions could be difficult to make. This could be as a result of the broadening of security which extends beyond military security (national defence) or the fact that only a few tribunals have made a clear distinction between public order and essential security interests in IIAs. If tribunals clearly distinguish between public order and security interests, host states could be dissuaded from undertaking excessive securitisation, by demarcating the scope of security interests.

⁴⁹ All of the claims require a situation where there should be certain urgency to invoke an exception, but the area for applying each claim could be different: necessity in international customary law (wide scope); public order and essential security interests in international economic law, such as international trade law and investment law.

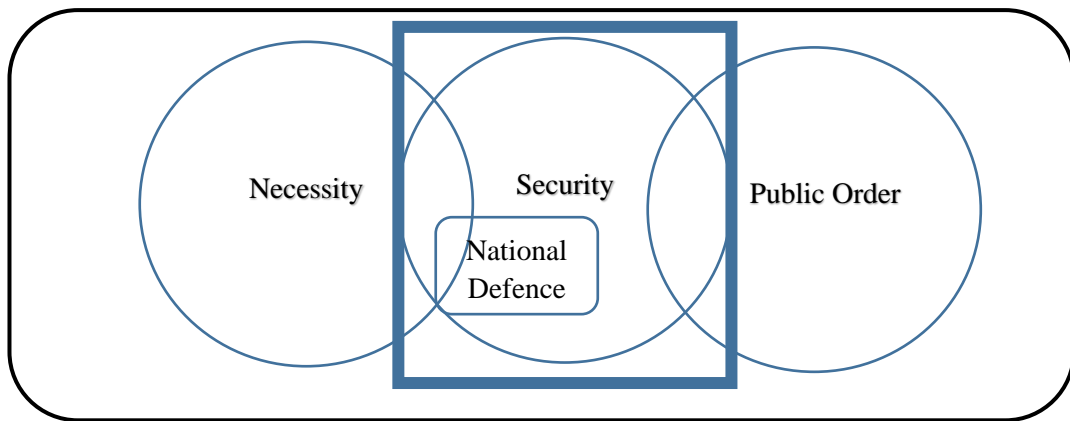


Figure 7 The dynamics among the three concepts

While this thesis argues that recognising the evolution of security – broadening and deepening⁵⁰ – is imperative to reflect evolving security demands, it highlights the necessity of demarcating the scope of security so as to prevent the concept of security from expanding in an unlimited and arbitrary manner. This is because, from the perspective of foreign investors, the evolution of national security would be understood as part of investment risk, and categorised as a foreseeable risk. As tribunals have recognised, if a host state explicitly confirms that certain types of issues can be subject to securitisation including societal, political, economic, military, more specifically energy security, foreign investors calculate risks for their investment in host states and achieve more accurate risk estimation. In other words, clearly broadening the scope of national security can prevent arbitrary measures of a host state from the perspective of foreign investors. Therefore, by delineating the scope of security, foreign investors and host states can estimate the latitude of regulatory space on the grounds of national security/essential security interests, thereby diminishing unexpected risks.

In addition to the clear understanding of closely related concepts, the connotation of risk in IIAs should not be neglected in recommendations. As section 2.2 demonstrates, the importance of critical infrastructure has increased for maintaining society and fostering the further economic development of a country, whereby host states have intervened in transactions on the grounds of security and public interests, based on risk assessments. Thus, though risk has become an essential part of security discourse, it

⁵⁰ See Chapter 1.2.2. The Copenhagen School and Securitisation.

remains challenging to determine whether measures on the grounds of risk can be legitimate within the ambit of security interests in order for a host state to be exempt from the obligation to pay compensation. If a host state decides to nationalise or expropriate foreign investment due to the mere possibility that the investment in question might cause a threat to national security in the future, it is less likely to avoid the compensatory obligation. In contrast, if a home state and a host state become politically hostile, and the investment is security-related, such as telecommunications and transportation, a similar type of measures may trigger such an obligation. However, as discussed in the previous chapters, because risk is perceived by countries in a different manner, which connotes that measures adopted to tackle the risk should differ, it is not easy to reach an agreement regarding whether measures on the grounds of risk could be justified within the scope of security.

Besides, it is also imperative to have a clear understanding of the purpose of IIAs. The approach to understanding the aim of IIAs should not be one-sided. It is not only to prevent a host state from misusing its sovereignty and impinging on the rights of foreign investors but also to recognise a host state's policy-space by introducing the notion of exceptions. **To achieve this effect, as analogous to the attempt in ILC Article 25 to clarify the scope of necessity and the requirements for the invocation of necessity, contracting parties and tribunals should endeavour to establish clear guidelines on the scope and the thresholds for invoking essential security interests.** Considering that countries have unique security concerns, this is a very ambitious suggestion although establishing thresholds to legitimise measures on the grounds of national security can enhance the understanding of shared security interests and mitigate arbitrariness.

The difficulty in harmonising the scope of security and covering a variety of security matters at the regional level is evidenced in the EU's approach in Chapter 3.2.3. For example, the 2008 review of European Security Strategy was criticised for failing to suggest more explicit security aims and means of achieving security.⁵¹ This is mainly because, while the Member States share common security issues to some extent,

⁵¹ Council of European Union, '2014 Annual Report from the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament on the Main Aspects and Basis Choices of the CFSP', Brussels, July 20, 2015, 11083/15, p. 16; see further Chapter 3.2.3. European Union.

countries have pressing and conflicting security interests. In other words, covering one security issue can be beneficial for one country, but can simultaneously impair another country's interests. Hence, widening the scope of security and introducing a new concept into the regional/collective security can easily face controversies and oppositions. Therefore, where many member states are involved in security negotiation, they would confirm a common regional/international goal, mostly eradication of terrorism or any shared security concerns rather than aim for a higher level of security tasks. Moreover, the inclusion of diverse security issues in the regional security denotes the enlargement of the regional or international institutions' jurisdiction, which can result in a clash or conflicts between a regional approach and a national approach.

Another evidence of potential opposing understanding regarding regional/common security can be found in the notion of the economy in the EU's CFSP. The EU recognises that the economy plays a role as soft power/sanction in the realm of security. However, for some countries, especially, Third World countries, economic security based on economic growth and infrastructure can be imperative. Where a myriad of security matters conflict, it may well be the case that military security agendas will be prioritised, such as terrorism, and cyber-crime over other types of security in the sense that there is no reference to economic security from the regional perspective.

In addition, it is also challenging to introduce new rules, at the collective/regional level, where prior rules have existed for the past decades. Therefore, whereas introducing new principles is not easy per se, the failure to embrace newly emerging issues can lead a regional/international entity to stagnate. Besides, the lesson, which we can learn from the EU's policy approach, is that the regional entity tends to provide the principles and focus on the due process of implementing security measures and to discuss the general global/regional agendas. This means that a country/a Member State can possess the authority to specify security rules in detail and establish security targets. In other words, regional and international institutions provide applicable principles in enforcing security rules, i.e. procedural at a minimum level, whereas national authorities can legislate more substantive types of security rules.

Moreover, the progression to the regional/international understanding of security has been impeded even further by the whole global stream which involves the insularity of individual countries as a result of recent developments, such as Brexit and the American isolation tendency following the start of Donald Trump's presidency. If the insulation of countries is accelerated, it will become implausible to achieve the regional/international approaches to security. Therefore, as a bilateral approach to IIAs and security is less onerous, contracting parties to IIAs should endeavour to reach agreement regarding the definition and the scope of security matters in the context of IIAs. The essence is to diminish investment risks from the perspective of foreign investors and to delineate the latitude of regulatory space in relation to security from the host states' point of view.

CONCLUSION

1. The Main Arguments

This thesis has examined the implications of the evolving notion of security in the IIL context. Throughout the thesis, I have shown that there has been a gap between the understanding of security by states and the evolving security demands. In order to narrow this gap, a more flexible concept of security needs to be incorporated in the realm of IIL. The thesis was initially motivated by the Argentine cases where the tribunals examined the legitimacy of emergency measures taken by the government of Argentina following its economic crisis. The Argentine cases clearly demonstrated the conflicting approaches of foreign investors and a host state in terms of the understanding of security interests in IIL. Regarding the measures, the government invoked essential security interests and public order to be exempt from the obligation to compensation whereas foreign investors claimed that the measures were tantamount to expropriations and the measures did not fall within the ambit of essential security interests, as the clause only concerned military security, rather than other types of security. In this thesis, I have found the solution to this conflict in embracing the broadening of security, which can also help achieve a coherent understanding of security among host states and foreign investors.

Alongside with an analysis of the incoherent application and interpretation of security in state policies, I also examined the dynamics between foreign investors and host states, as a result of internationalising a domestic investment market. Given the lack of domestic/internal capital, host states conclude IIAs and apply the recommendations of the IMF or the World Bank, such as privatisation of public sectors, to attract foreign capital and investment. Thereby, a host state should abide by more international and quasi-international commitments. This renders a host state potentially subject to disputes for measures it takes. In other words, the conclusion of international agreements has rendered regulatory space of states restricted in the sense that measures aimed at public interests – or in the context of this thesis essential security interests/national security – would be exposed to potential challenges by foreign investors.

In addition to this, the disagreement on the scope and definition of security aggravates this phenomenon insofar as host states would believe their measures would fall within the ambit of security. On the other hand, foreign investors would argue that the measures exist outside its legitimate scope. Therefore, I have assessed in this thesis whether it is possible to lessen the confusion with regards to legitimate measures on the grounds of security and thereby narrow down the gap between foreign investors and host states by defining security and delineating its scope.

Exceptions are imperative to making international agreements viable and sustainable/legitimate. They function as a flexibility tool insofar as they strike a balance between foreign investors and host states by securing a certain level of policy space that could have been diminished as a result of concluding a BIT. Accordingly, throughout the thesis, I have explored the extent to which the notion of security can play a role as an exception or a ground to legitimise a state's measure in the realm of IIL.

In order to examine the role of evolving security in IIL, this thesis has sought to define national security first. This is because without the consistent and coherent understanding of security interests, it is not possible to analyse how the notion of security could be applied in IIL. Such an incoherent understanding would potentially cause more disputes between foreign investors and host states.

As shown in Chapter 2, foreign investors claimed in the Argentine cases that security exceptions should be invoked only for measures to address a military security issue, not an economic crisis. Concurring with the tribunals' opinion, I criticised this approach because it leads to an unbalanced interpretation of security exceptions since an economic crisis is as imperilling and serious to national security as military threats. Therefore, the purpose of the study has been to highlight the necessity of broadening of security, extending beyond military security and to incorporate evolving security demands in international investment agreements and policies to achieve more balanced application and interpretation of security exceptions. Moreover, while I argued that broadening of security has taken place and is needed to serve evolving security demands, I also highlighted the necessity of demarcating the scope of security in order to deter excessive securitisation. To do so, I have compared other concepts used for derogations, such as public order and necessity; yet this comparison led to the

conclusion that while each concept has its own area, there exists a certain overlap among those concepts. For instance, military insecurity could lead society to be dysfunctional and lack of economic security could diminish the ability of people to operate according to social values and norms established in society. To assess the implications of the broadening of security in relation to IIL more contextually, I have used a comparative research method for examining three types of foreign investors and demonstrating how the broadening of security would affect each type of foreign investors' rights and expectations to host states. In conclusion, my research has found that the broadening of security has extended to every type of foreign investors. However, depending on the type of foreign investors, the notion of security can become simplified or multifaceted, as each type of foreign investors retains distinctive security dimensions.

2. Contribution of the Thesis

As aforementioned, this thesis seeks to tackle the incoherence following the different approaches to the notion of security between foreign investors and host states. I attempted to define security by exploring different security schools. Notwithstanding, as Art argues “security is ambiguous and elastic in its meaning”,¹ the previous chapters demonstrated that the notion of security can become multifaceted or simplified, depending on the context. In security studies, many scholars acknowledged the evolution of security – in other words, security does not only indicate military security which concerns existential inter-state military threats, but covers a variety of other security interests, ranging from military to socio-economic security (Chapter 1). Although this thesis adopts the terms “national security” and “essential security interests” interchangeably, the accurate meaning of national security is not confined to the survival of state in terms of security referent object. Instead, the essential referent object should be population of a state as the survival of the population underlies the survival of state – for example, economic instability of population could place the survival of population at stake, and this could deteriorate the survival of the state. Therefore, the sole emphasis on military security, as the Realist School insists, cannot incorporate security demands for the survival of population as well as the survival of

¹ R. Art, ‘Security’, in J. Krieger (ed.), *The Oxford Companion to Politics of the World*, New Oxford: Oxford University Press 1993, p. 820, cited in H. G. Brauch, *Environment and Human Security: Towards Freedom from Hazard Impacts*, UNU-EHS, 2005, p. 8.

the state. And this recognition of the broadening also can address incoherence between national security policies and investment policies. In the context of IIL, the previous research has examined whether concluding international investment agreements or implementing investment laws are only to protect the interests of foreign investors, and noticed the development in which tribunals in IIAs also recognised a measure against an economic crisis could fall within the scope of essential security interests. Although Kurtz discusses the essential security interests exception at IIL, the focus of research was placed on tribunals' interpretation on exceptions, such as public order and security interests in IIL and the WTO and the way to interpret the concept, i.e. whether a tribunal should draw upon customary international law principles. Partially agreeing with his argument as to the relationship between IIL and customary international law, I attempted to apply the broadening of security in the context of IIL. As the Argentine tribunals held that essential security interests in IIAs does not exclude other types of security, it is increasingly recognised that economic, societal and political security should be also encompassed within the scope of security interests in understanding the relations between foreign investors and host states. However, the clear delineation has not been made, and this thesis can bridge between two areas, that is, security studies and IIL.

It is true that the broadening of security can secure states' regulatory space as this can help in expanding the latitude of legitimate measures on the grounds of national security/essential security interests in investment law. But the scope of security should be demarcated in order to retain the legitimacy of broadening. In other words, while recognising the broadening of security, which can help secure certain regulatory space, I denounce the excessive broadening of security. As one of the main arguments of this thesis is that the broadening of security in the context of IIL does not necessarily impinge on the interests of foreign investors, it is important to prevent an excessive broadening of security and securitisation. Hence, with the clear demarcation of its scope, enhanced certainty for both foreign investors and host states can be achieved.

As opposed to conventional understanding that the rights and interests of foreign investors could be at stake, if a host state has the discretion to invoke exceptions, which enable the state to derogate from its obligation to compensation, I argue that this can be deterred by the effort made by a host state to draft a policy report as to how it

approaches national security and what types of security interests that the host state seeks to protect exist.

3. Overview of the Chapters

Throughout the thesis, I showed how the notion of security has evolved and how this evolution could influence the investment policies of host states and suggested how host states and tribunals could take this understanding into account for clear and coherent application and interpretation of the concept.

In Chapter 1, I began my investigation with the chronological analysis of the evolving notion of security and the examination of the main schools in the literature on security—the Realist School, the Copenhagen School, the Paris School, and the Constructivist School. Firstly, the chronological examination on the evolution of security showed that security is not a static concept, but a fluid one that is subject to changes, and contingent on international and national environments. This implied that the expansion of security – with incorporating a variety of security interests, such as economic security, and risk as a newly emerging type of threat – can be accommodated within security studies, as the concept per se retains certain flexibility in itself. In addition, the analysis on security schools² can lead to delineating the scope of security; in other words, to what extent broadening and deepening national security has taken – or should take – place. I contended that the Realist School cannot serve evolving security demands insofar as the school only places great emphasis on military security.³ The significance of military security is undeniable in that the notion of military security has an establishing role in national security and security studies, but scholars and policy-makers should accept that the sole focus on military security may well lead to overlooking what causes insecurity because national insecurity can stem from variable threats, extending beyond military threats.

With the goal of challenging and complementing the traditional approach to security, the Copenhagen School, with the sectoral analysis and securitisation, demonstrates how the notion of security could be broadened and deepened, which can help

² Those schools have distinctive approaches to what should be securitised, who should securitise, and for whom they need to securitise issues.

³ See Chapter 1.2.1. The Realist School regarding why a certain gap has emerged between strategic studies (the Realist School's approach) and reality (evolving security demands).

understand changing security demands in reality and introduce security policies accordingly. Buzan, a scholar of the Copenhagen School, diversifies referent objects of security, ranging from a state through a territory to a society. This approach challenges the state-centric understanding of security and diversifies security concerns, including immigration and identity of local/religious groups. Moreover, the sectoral analysis of the Copenhagen School widened the scope of security from traditional military security to others by incorporating economic, political, societal and environmental security. Although the school is sceptical of securitisation of economic issues, given the belief that measures on the grounds of economic security are often implemented for pursuing other purposes, such as taking a protectionist approach in economic policies, the school argues that each security issue has its own contextual understanding. However, the school was criticised for failing to discuss how to tackle a situation where security interests are in conflict, in other words, which security should be prioritised. This issue might be resolved and complemented by the approach of the Constructivist School. By taking a more flexible and reflective approach to security, as opposed to the traditionalist way, the Constructivist School argues that a referent object should vary, depending on the types of security issues. Thus, regarding dealing with security interests in conflict, the Constructivist School would argue that individual (population) emancipation is the ultimate goal of security, which connotes that whatever keeps individuals from emancipation should be tackled as a top priority. To denounce the criticism for not explaining which security should take precedence, the Copenhagen School could also note that security issues could be intertwined – for example, societal insecurity could ensue from a failing government (political insecurity) and military insecurity can be caused by economic tensions with other countries. Therefore, it is pregnable to claim for a list of which security should be prioritised because a security priority should be determined on a case-by-case basis.

The Copenhagen School also demonstrated how an issue becomes securitised by a speech act. Where it is not possible to deal with an issue within the realm of normal politics, a policy-maker who is sufficiently persuasive attempts to convince the audience that securitisation of the issue concerned is imperative. Along with the sectoral analysis, securitisation of the Copenhagen School is not confined to a military security issue, but encompasses the aforementioned security issues. With the concern of excessive securitisation, the school highlights that the ultimate goal of securitisation

is de-securitisation that results in bringing a securitised issue within the normal politics, as the objective of securitisation by the Copenhagen School is not to incorporate all the issues in the category of security.

In line with the Copenhagen School, the Paris School also examines securitisation. While the Copenhagen School analyses the process of an issue becoming political, securitised and de-securitised, the Paris School looks at implications surrounding securitisation in depth/in detail. It examines competition among security interests and security actors, insecuritying the audience, and calling for extraordinary measures, which helps affirm the role of security actors. In addition, the Paris School discusses the possibility for a security issue not to represent a security target as initially planned, as the process involving competition between security actors and response from the audience modifies the initial security target. We can learn a lesson from this analysis that a policy-maker should undertake chronological reviews for the process of securitisation and in order to determine whether security measures and policies, as a result of the securitisation, tackle insecurity.

In addition to the studies of security schools and the chronological analysis of the evolution of security, Chapter 1 also explored the burgeoning notion of risk, which arguably realises security in a more effective manner. However, as discussed in Chapter 1, risk is accompanied with cultural recognition and has room for diverse interpretations by the authority in charge of disseminating knowledge. This is analogous to securitisation by a speech act as the Copenhagen School argued. This signifies that risk has high subjectivity which can result in arbitrary definitions and different reactions, based on cultural orientations and the intention of policy-makers. Thus, it gives rise to potential discretionary actions which could be shielded with the fear of risk becoming a threat with catastrophic ramifications against criticisms with respect to the efficacy and legitimacy of such actions. Therefore, I argue that while it is inevitable to observe the significant role risk plays in security, it is necessary to acknowledge that risk is susceptible to abuse arising from misestimating potential repercussions of the risk concerned.

Chapter 1 explored theoretical approaches towards national security demonstrating different security schools while Chapters 2, 3 and 4 showed the empirical application regarding how the broadening of security has taken place in IIL and how this would

affect each type of foreign investor: corporate foreign investors, government controlled foreign investors, and individual foreign investors. Chapter 2 analysed the Argentine cases that overtly demonstrated the conflict between Argentina and corporate foreign investors with regards to the understanding of national security in the realm of investment law, in order to examine how tribunals interpreted national security – essential security interests in IIL. To understand the international interpretation and highlight the differences, Chapter 2 not only looked at the terms related to security, such as public order, essential security interests, and national security, but also elucidated the relationship between security exceptions and a state of necessity. Whilst the examination of those terms aims to demarcate the scope of security for implementing legitimate measures on the grounds of security, it is true that the boundaries among these concepts are often fuzzy. This does not mean that the thesis argues that those concepts should cross into each other's borders. Instead, while adjudicative bodies endeavour to clarify each concept's definition and boundary so that host states understand their regulatory space in relation to each concept, it should be understood that in reality certain overlaps inevitably exist among those concepts.

The attempt for adjudicative bodies to define the boundary of essential security interests is portrayed in the Argentine cases. The Argentine tribunals held that economic security should be understood as important as military and political security in the international investment arena, given that the exclusion of economic security interests from the scope of essential security interests in the BIT would lead to an unbalanced interpretation of the security exception. Thus, repercussions caused by an economic crisis can be as serious and imperilling as those stemming from military and political insecurity, although the tribunals had different interpretations on the requirements for invoking essential security interests in the BIT. The different interpretations generated contesting rulings regarding the legitimacy of emergency measures implemented by the Argentine government. However, an economic emergency per se was consensually acknowledged by the tribunals to be eligible for legitimate measures on the grounds of essential security interests, which means a host state having taken such a measure can be exempt from the obligation to pay compensation for the loss or damage onto other parties caused by the measure in question.

While Chapter 2 discussed the tribunals' interpretation of national security and national security reports in general, Chapter 3 demonstrated how the concept of national security has been applied in national security strategy reports and investment policy of North American countries, European countries such as the UK, Germany and France and the EU. The gap between states in terms of approaches to security can signify a different threshold for each of them to invoke national security, which resultantly causes an international conflict. Comparing the approaches to security in the international arena and in national arenas showed incoherence in the security policies to the extent that while home states, mainly developed countries, attempted to construe security interests in a narrow manner in the IIL context, they sought to introduce a myriad of security aspects, including a risk-based approach and critical infrastructure in order to be more prepared and resilient for emergency situations.

Chapter 3 also examined how countries define critical infrastructure in their policies pertinent to foreign investment, as the subject of critical infrastructure is closely related to national security. Before this discussion, the chapter analysed foreign investment controlled, owned or sponsored by a foreign government first, given the potential significant effect of such investment on national security and critical industries. As shown in Chapter 3, when dealing with GCIs, four categories of countries are representative of the practical reality: (i) a country which does not specify any restriction subject to GCIs, (ii) a country which imposes a restriction on GCIs in particular sectors, (iii) a country which have restrictions to all GCIs (for instance, a complete prohibition unless authorisation is granted in the case of Iceland), and (iv) countries which require GCIs reviews. Mostly, countries adopt approach (ii) above whereby host states specify particular sectors – mainly critical infrastructures, such as communications, transports, and energy sectors – where GCIs are not allowed to invest.

Contrary to the case of corporate foreign investors where a host state seeks to address emergency situations (*ex-post*), decisions made by a host state, in the context of GCIs, are rather based on risk management (*ex-ante*). This means a host state is more concerned about potential ramifications arising out of GCI's control over a certain type of industries. There have been many cases for a host state to intervene in a transaction where a GCI attempted to acquire a domestic industry, closely related to critical

infrastructure which involves socio-economic security interests. The protection of critical infrastructure and/or national champion industries does not simply denote a protectionist approach towards foreign investment but signifies the concern that the control over those industries can augment the risk based on the belief that the operation by GCIs could be made for non-commercial purposes. The inclusion of risk in assessing the implication of a foreign investor in relation to national security demonstrates that the broadening of security is more conspicuous in the case of GCIs than that of corporate investors. However, this approach is pregnable because it is improbable for a host state to determine whether a foreign GCI has any intention other than the pursuit of maximising a company's profits. Thus, it may give rise to an unfair decision from the perspective of foreign investors, as the decision made against GCIs is often based on risk assessment. The UK also pinpointed the possibility of decreasing transparency and predictability and causing arbitrary decisions against GCIs, where the concepts of public interest and national security play a larger role in making a decision for foreign investors. Although all the countries take liberal investment policies in general, they have different approaches to national security in foreign investment policies. For example, the UK has more liberal foreign investment policy with less restriction related to critical infrastructure, whereas the French investment policy is more restrictive by introducing more industries on the list for which foreign investors require authorisation to locate investment in France.

As mentioned in Chapter 3, in the context of foreign investment policy, security has two dimensions: one in line with the traditional approach, that is, military security that covers the protection of war/defence-related industries, and the other with the broadened approach, which deals with the protection of critical infrastructure having socio-economic security interests. The latter approach has been increasingly incorporated in foreign investment policies by states and resulted in a more specific and fragmented policy; for example, depending on (i) the nationality of investor, i.e. whether domestic, EU or foreign, (ii) the type of investor, i.e. whether or not a GCI, and (iii) the type of industries, i.e. whether or not industries with security interests, a foreign investor would be subject to different rules.

The reason for imposing stringent rules on GCIs in critical infrastructure is because any operational failure of critical infrastructures would give rise to a serious socio-

economic distress in a country. Given the concern of a host state that any political decision of a home state might colour the operation of the investment, a GCI in critical infrastructure is inevitably subject to higher level of vigilance. However, a host state should contemplate the implications of additional restrictions imposed on a GCI and interventions in takeover transactions by a GCI prior to making a decision because a wider application of security in investment policy can destruct the balance between the pursuit of a liberal investment policy and the protection of security interests.

Chapter 4 shifted the focus from collective action to individual action – that is, the chapter examined if there is any relation between national security and individual foreign investors who become citizens or hold a certain residence permit under a special immigration programme. I examined citizenship-by-investment schemes in the Caribbean countries of St. Kitts and Nevis, and Antigua and Barbuda, and European countries including Malta, Cyprus, Bulgaria, Romania and Ireland. I also focused on immigrant residence permit programmes for foreign investors. Most countries which adopt the citizenship-by-investment programme face some form of domestic economic problem. Therefore, from their perspective, an immediate and certain economic benefit would outweigh the need to stabilise national security that could be negatively affected by a citizenship-by-investment programme. Thus, a host state may be aware that such a programme could be construed as selling sovereignty or trading security in exchange for economic development and cash flows, but as the state is in need of financial capital that is imperative for national development and economic diversification as evidenced in the case of St. Kitts and Nevis, the government of the host state may encounter such dilemma to choose between national security and foreign capital influx. After discussing the controversies surrounding such schemes and shedding light onto questions about their legitimacy, I argue that rather than denouncing potential side effects that could arise out of the programmes, a host state calculate the economic benefits and potential risks to public policy, public order and national security, and then revise or abolish the scheme, based on the calculation. Moreover, in order to minimise abusive usage of such a programme – for example, famous fugitives accused of corruption become naturalised under a CIP to avoid a passport control – host states should introduce a code of conduct on ethics and compliance and strengthen due diligence with great cooperation of law enforcement institutions to enhance security, controls and administrative process.

Chapter 4 analysed the implications of citizenship-by-investment programmes and immigrant residence permit programmes for foreign investors in the context of national security. It probed if those programmes can pose a risk to national security and what type of individuals' citizenship can be revoked on the grounds of national security. Given the small size of investment located by an individual foreign investor who became naturalised, it is unlikely that an individual investor would pose a risk to socio-economic and political security, as opposed to a corporate foreign investor and a GCI. Instead, the citizenship status of an individual can be misused to avoid international sanctions against his/her original nationality. Alternatively, it can be a way to source international organised crimes, which can amount to treason and endanger military security. Thus, the broadening of security plays a relatively minor role in the sense that great emphasis is placed on military security in the context. Yet, certain broadening has taken place insofar as it does not only seek to tackle an existential threat, but also to address a potential threat, i.e. a risk to military security.

Chapter 5 scrutinised the relationship between foreign investors and host states by examining tribunals' awards and the rights of foreign investors in the IIL arena. Particularly, in relation to expropriation, it highlighted the necessity of striking a balance between those conflicting interests. The chapter underscored that despite the exceptions, as a flexibility tool, which are established to tackle the imbalance and to secure certain regulatory space, the IIL system has failed to have a clear understanding of the extent to which a host state can take a legitimate measure by invoking an exception. For example, to examine the regulatory space as a result of concluding international investment agreements, Chapter 6 discussed the doctrine of the police powers of state arising from sovereignty. Although there is a certain consensus as to the definition and scope of the police powers, which is contrary to the case of security exceptions, the applicability of the doctrine has been understood in a narrow manner. In the context of international investment, mostly under the NAFTA, the doctrine was invoked only to legitimise measures for the preservation of environment. This indicates that a non-discriminatory state's measure for the protection of public interests may not fall within the ambit of police powers. It is true that exceptions should be invoked at a minimum level and read in a narrow manner to curb abusive uses; yet they should be sufficiently viable so that they can serve their role as a flexibility tool. However, in the case of security exceptions, given the lack of consensus regarding

types of situations requiring security measures and the procedural mechanisms, the exceptions become less viable. Therefore, I argued that exceptions in IIL have not been to strike a balance between the interests of foreign investors and those of host states, and the broadening of security could complement this imbalance.

Lastly, in Chapter 6, I suggested recommendations for host states and tribunals based on the examination and analysis in the previous chapters. In relation to theories, while acknowledging the necessity of broadening of security, extending beyond inter-state military security, I recommended ways that a state could approach securitisation and perceive investment risks. In this regard, I argued that the broadening of the national security should not be interpreted as an attempt for an unlimited expansion of security. Rather, it should aim to incorporate evolving security needs. Also, the importance of de-securitisation should not be overlooked in order to prevent every issue from becoming securitised, which in effect would trivialise security matters and thus jeopardise the legitimacy of security. Especially, if a measure is implemented against a risk that has not become a real threat, a government should have a clearer objective of the measure against the situation, and understand whether the measure is adequate to rectify the situation so that it can be ensured whether the measure is used to achieve other objectives. To that end, a government should embark on periodic reviews for measures against threats and risks to examine the efficacy of the measures concerned. Particularly, a government should provide certain proof to demonstrate that a catastrophic result can ensue once a risk materialises, absent a certain measure.

I also addressed the peculiarity of security matters in order to demonstrate that each country has its own security interests although many countries have common security interests. This feature implies that it is difficult to reach an agreement among states with regards to the concept and scope of security, more specifically, situations which could allow states to take legitimate security measures. Therefore, in order to minimise the confusion that can be possibly caused by the lack of consensus in this regard, I argue that a government should provide clear security targets in its security policy reports or foreign investment-related documents so that foreign investors can estimate potential actions for the protection of essential security interests of the host state.

In addition, regarding conceptual and analytical dimensions, I argued that a boundary should be established between customary international law (in this context, necessity)

and international investment law (essential security interests or national security). As opposed to drawing upon the requirements of necessity, I recommended that unless there is an explicit reference to necessity in a treaty provision, tribunals not apply operative requirements of necessity to determine the legitimacy of measures on the grounds of essential security interests.

Subsequently, I make a number of institutional recommendations for host states in accordance with each type of investors: corporate investors, GCIs, and individual foreign investors under a CIP. By comparing different types of foreign investors, I highlighted that the gravity of the type of security also varies by type of investor. Regarding corporate investors, military, societal, economic and political security have an equal weight, whereas, for a GCI, the roles of military and societal security become augmented with economic and political security. This feature was evident insofar as in dealing with a GCI, a host state implements more stringent rules for particular industries that are either closely related to war/defence and socio-economic interests, that is, critical infrastructure. Contrary to the two types of investors, in discussing individual foreign investors, naturalised under a CIP, military security plays a major role, as one foreign investor is not likely to cause national economic emergency, societal distress or political instability. Thus, the comparison of the different types of foreign investors showed that the notion of security is fluid and multifaceted rather than static. To that end, tribunals, states, and foreign investors should understand security exceptions in IIL so that they can have a clearer understanding regarding the latitude of legitimate security measures and measures outside this latitude.

4. Future Research

In this thesis, I examined the scope of measures that can be legitimised on the grounds of national security/essential security interests in IIAs/BITs. While its scope has become clearer throughout the thesis, more research is needed in order to examine whether risk can be incorporated within the scope of legitimate security measures. Whether a measure aimed at tackling risk – based on the premise that the measure taken was not intended to resolve other issues – can be within the scope of legitimate security measures is an important question since this could broaden the regulatory space of governments to a significant extent, as a host state would not be obliged to

pay compensation once the measure in question falls successfully within the aim of essential security interests.

In addition, to scrutinise the evolving concept of security, future research could map the evolution with a view to the meaning of public order/public policy/*ordre public*. As all notions can evolve to some extent, it can be interesting to examine whether the evolution of public order has taken place or the notion has room for further development. In relation to public order, a fascinating future research proposal is to identify a possible overlap between public order and national security can be also studied or the correlation of those two concepts as exceptions in IIAs can be further examined.

Another interesting area of research would be to examine the scope of legitimate security measures from the perspective of developing countries. In the previous chapters, I drew on examples from the developed world. But I also noted that it is questionable to legitimise measures aimed at enhancing economic development implemented by developing countries, in particular, the least developed countries. This is because measures against socio-economic insecurity could fall within the ambit of security, and in general, an emergency could be seen to be an abnormal situation, signalling societal dysfunctionality. However, often, in some developing countries, poverty is acute, so economic development can be the key to economic security. Therefore, in the future, the legitimacy of security measures aimed at eradicating chronic poverty (or improving the economic level) can be examined.

Finally, a potential future research would be a more sustained attention to the relationship between GCIs and security interests. As discussed in Chapter 3, GCIs are more likely to be subject to more stringent rules. This is because host states fear that the involvement of another government in operating an investment can have a negative impact, especially since GCIs tend to invest in sectors very closely related to critical infrastructure and the financial sectors. On the one hand, it is reasonable to find a connection between such a tendency and security concerns that host states have as those sectors play pivotal roles in a society. On the other, as shown in Chapter 3,⁴

⁴ Especially, the conflicting interests between GCIs and host states are well portrayed in Chapter 3.4. National Security in Domestic Investment Law and Critical Infrastructure.

imposing either special or stricter requirements on GCIs is often criticised for giving rise to market protectionism, as opposed to more liberal economic policies. Accordingly, an inquiry regarding whether stringent rules should be justified either given the type of investors (private or governmental) or the type of sectors (critical or non-critical) can also shed light onto the legitimacy of stringent rules applied to GCIs.

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